Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

JURY SERVICE RESOURCE CENTER.
DAVID SHANNON, AND
ROBERT PAUL LANGLEY, JR.,

Petitioners,

v.

STATE OF OREGON, ET AL

Respondents.

On Petition for a Writ of Certiorari to the
Supreme Court of Oregon

PETITION FOR A WRIT OF CERTIORARI

S. Rose Jade
P.O. Box 2104
1676 N. Coast Highway
Newport, Oregon 97365
(541) 961 8423

Counsel for Petitioners

CAPITAL CASE

In 2001, the Oregon legislature enacted a statute that made state court jury lists "confidential" and forbade a court from allowing the public, including all prospective jurors and some litigants facing a jury trial, from inspecting the lists. Under the statute, only those litigants facing a jury trial who already had facts to aver a prima face case of jury system error, and who had filed a challenge supported by those facts, could ask to see the jury lists. Petitioners - - a non profit organization studying a state circuit court's jury system, a prospective juror, and a death penalty defendant who lacked facts to aver a prima facie case - - filed a declaratory judgment action seeking standing and an opportunity to inspect the lists under the First, Sixth, Ninth and Fourteenth Amendments (Due Process and Equal Protection Clauses). The court below denied their requests for access to the lists, upholding the statute against Petitioners' federal constitutional challenges.

QUESTIONS PRESENTED

1. Whether a state may deprive persons of standing for the opportunity to vindicate their federal statutory and constitutional rights pertaining to state court jury service, consistent with the First, Sixth, Ninth and Fourteenth Amendments to the U.S. Constitution.

2. Whether a state may burden a person's right to standing and opportunity to vindicate federal jury-related rights by requiring the person to file a sworn prima facie case of jury system error before allowing the person to inspect the state court jury lists for evidence of a violation of 18 U.S.C. 243, or of the Sixth or Fourteenth Amendments, consistent with the First, Sixth, Ninth and Fourteenth Amendments to the U.S. Constitution.

PARTIES TO THE CASE

The parties to this proceeding are Petitioners as identified on the cover page of the Petition, and Defendants State of Oregon and:

Paul J. De Muniz, Chief Justice of the Oregon Supreme Court and Head Administrator of the Office of the State Court Administrator, Oregon Judicial Department,[1]

Kingsley Click, State Court Administrator, Office of the State Court Administrator, Oregon Judicial Department,

Paul Lipscomb; Presiding Judge and administrative head of the Marion County Circuit Court,

James Murchison, Marion County Circuit Court Trial Court Administrator;

Dale Koch, Presiding Judge and administrative head of the Multnomah County Circuit Court,

Douglas Bray, Multnomah County Circuit Court Trial Court Administrator;

Robert Huckleberry, Presiding Judge and administrative head of the Lincoln County Circuit Court,

Nancy Lamvick, Lincoln County Circuit Court Trial Court Administrator,

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[1]See Or. Sup. Ct. Order allowing substitution of party for former Chief Justice Wallace P. Carson, Jr., 1/19/06 OJIN #25.

Bill Bradbury, Secretary of State and Public Records Administrator,

Roy Turnbaugh, State Archivist.

CORPORATE DISCLOSURE STATEMENT

Petitioner Jury Service Resource Center is a dba of Firebare, Inc., a non-profit 501(c)(3) registered with the State of Oregon. Firebare, Inc., does not issue stock.

TABLE OF CONTENTS

QUESTIONS PRESENTED ..... (i)
PARTIES TO THE CASE ii
CORPORATE DISCLOSURE STATEMENT iii
TABLE OF AUTHORITIES v
OPINIONS AND ORDERS BELOW 1
JURISDICTION 1
CONSTITUTIONAL PROVISIONS AND STATUTES 1
STATEMENT OF THE CASE 1
REASONS FOR GRANTING THE WRIT 4
I. The Two Issues Presented are Recurring and of Great Public and Practical Importance. 5
A. This Case Squarely Presents the Issues. 11
II. The Decision Below Directly Conflicts with the Court's Opinions on Standing and Opportunity to Vindicate Federal Rights. 11
III. The State Courts are Divided Over Whether the Federal Constitution Forbids a State From Refusing Public Inspection of State Court Jury Lists. 23
IV. The Decision Below is Incorrect. 27
A. Under the "Experience and Logic" Test of the First Amendment, there is historical support for public inspection of state court jury lists, and public inspection of the lists plays a significant role in state jury selection. 27
CONCLUSION 30

TABLE OF CITED AUTHORITIES

UNITED STATES SUPREME COURT CASES

Alexander v. Louisiana, 405 U.S. (1972).....6, 10, 18
Apprendi v. New Jersey, 530 U.S. 466 (2000).....5
Arnold v. North Carolina, 376 U.S. 773 (1964).....6
Avery v. Georgia, 345 U.S. 559 (1953).....10
Ballard v. United States, 329 U.S. 187 (1946).....6
Batson v. Kentucky, 476 U.S. 79 (1986)
.....5-6, 10, 13, 19, 30, App 50 n8, 53-54 n12, 62, 64
Blakely, Jr. v. Washington, 542 U.S. 296 (2004).....5, 8, 29
Bush v. Kentucky, 107 US 110 (1883).....6
Campbell v. Louisiana, 523 U.S. 392
(1998).....6, 12, App 44, 50 n7, 52, 64, 72
Carter v. Jury Comm'n of Greene Co.,
396 U.S. 320 (1970).....6, 9, App 44, 52, 62, 72, 78
Carter v. Texas, , 177 U.S. 442 (1900).....6, 11
Cassell v. Texas, 339 U.S. 282 (1950).....6
Castaneda v. Partida, 430 U.S. 482 (1977).....6, 18
Cooper v. Brd of Directors of the Little Rock, Arkansas,
Independent School District, 358 U.S. (1958).....22
Cox Broadcasting Corp., 420 US 469 (1975)..... App 44
Davis v. Wechsler, 263 U.S. 22 (1923).....30
Dombrowski v. Pfister, 380 U.S. 479 (1965).....22
Duncan v. Louisiana, 391 U.S. 145 (1968).....8
Duren v. Missouri, 439 U.S. 357 (1979)..... 8, 12, 13, App 62
Edmonson v. Leesville Concrete Co., Inc.,
500 U.S. 614 (1991).....10, 20
Eubanks v. Louisiana, 356 U.S. 584 (1958).....6
Georgia v. Rachel, 384 U.S. 780 (1966).....22
Globe Newspaper Co. v. Superior Court,
457 U.S. 596 (1982)..... 7, App 7-10, 22
Greater New Orleans Broadcasting Assn., Inc.
v. United States, 527 U.S. 173 (1999)..... App 44
Hill v. Texas, 316 U.S. 400 (1942).....6, 9-10

Houchins v. KQED, Inc.,
438 U.S. 1 (1978) .....28, App 13, 43, 47, 71 n30
In re Oliver, 333 U.S. 257 (1948).....8
J.E.B. v. Alabama ex rel TB, 511 U.S. 127 (1994)..... App 62
Johnson v. California, 545 US 162,
(2005) ..... 5-6, 11, 30, App 53-54 n11, 64, 72
Johnson v. U.S., 520 U.S. 461 (1997)..... App 62
Lockhart v. McCree, 476 U.S. 162 (1986)..... App 26
Los Angeles Police Department v. United Reporting Publishing Corporation, 528 U.S. 32 (1991) later proceeding at *URPC v. California Highway Patrol*, 231 F. 3d 483
(2000) .....28-29, App 13, 44, 48, 52, 68, 71 n30
Middlesex County Ethics Comm., 457 U.S. 423 (1982).....22
Miller-El v. Dretke, 545 U.S. 231,
162 L. Ed. 2d 196, (2005).....5-6
Mills v. Alabama, 384 U.S. 214 (1966) ..... App 7
Neal v. Delaware, 103 U.S. 370 (1881).....6, 10
New York Times Co. v. Sullivan, 376 U.S. 254 (1964).....29
Norris v. Alabama, 294 U.S. 587 (1935) 6, 10
Perry v. Sindermann, 408 US 593 (1972) ..... App 44
Peters v. Kiff, 407 U.S. 493 (1972).....9
Pierre v. Louisiana, 306 U.S. 354 (1939) 6, 10
Powers v. Ohio, 499 U.S. 400
(1991).....6, 9, 16, 20, App 44, 50 n7, 63-64
Press-Enterprise v. Superior Court, 464 U.S. 501 (1984) *(Press Enterprise I)*.....7, 25, 28, App 8-13, 20-29, 44
Press-Enterprise v. Superior Court, 478 U.S. 1 (1986) (Press Enterprise II)..... 7, 25, 28, App 8-13, 20-29, 44
Reece v. Georgia, 350 U.S. 85 (1955) 6, 11, 22
Richmond Newspapers, Inc. v. Virginia,
448 U.S. 555 (1980)..... 7, App 7, 10
Ring v. Arizona, 536 U.S. 584 (2002).....5
Rogers v. Alabama, 192 U.S. 226 (1904).....6
Rose v. Mitchell, 443 U.S. 545 (1979).....6, 9-10
Rubin v. Coors Brewing Co., 514 U.S. 476 (1995) ..... App 44
Smith v. Texas, 311 U.S. 128 (1940)... 6, App 53 n11, 64, 72
Strauder v. West Virginia,
100 U.S. 303 (1879)..... 6, 22, App 53, 62

Taylor v. Louisiana , 9 U.S. 522 (1975) ....6, 13, App 50, 62, 64
Test v. United States, 420 U.S. 28 (1975) ..... 13, 23-25, App 44, 72
Thiel v. Southern Pacific Co., 328 U.S. 217, 220 (1946)....10
Tollet v. Henderson, 411 US 258 (1973).....20-22
Tumey v. Ohio, 273 U.S. 510 (1927).....9
Turner v. Fouche, 396 U.S. 356 (1970).....10
United State v. Gale, 109 U.S. 65 (1883) 11
Vasquez v. Hillery, 474 U.S. 254 (1986).....22
Wardius v. Oregon, 412 U.S. 470 (1973).....11
Whitus v. Georgia, 385 U.S. 545 (1967) ..... App 62, 82
Williams v. Georgia, 349 U.S. 375 (1955).....21
Younger v. Harris, 401 U.S. 37 (1971) 22

CASES FROM OTHER COURTS

Anderson v. Gladden 234 Or. 614, 383 P2d 986 (1963) later proceeding at 303 F Supp 1134 (1967) ..... 21, App 51 n8
Azania v. Indiana, 778 NE2d 1253 (2002)..... 17, App 75
Bradley v. Shreveport Gas, Electric Light & Power Co., 139 La. 1029, 72 So. 725 (1916) . App 91 n 50
Bramwell v. Rowland, 123 Or. 33, 261 P 57 (1927)... App 25
Brogden v. State, 102 Md App 423, 649 A2d 1196 (1994) ..... App 63 n24
Commonwealth v. Campbell, Jr., 378 Mass. 680, 393 N.E.2d 820 (1979) 24
Commonwealth v. Carson, 559 Pa 460, 741 A2d 686 (1999) ..... App 63 n24
Commonwealth v. Long, 2005 Pa. Super. LEXIS 496, 871 A.2d 1262 (2004), *appeal granted in part* by 2005 Pa. LEXIS 2072 (2005) and 2005 Pa LEXIS 2073 (2005) 26
Cox v. State of Oregon, 191 Or App 1, 80 P3d 514 (2003) ..... App 24

Cross v. State, 272 Ind. 223,
397 NE2d 265 (1979) ..... App 90 n50
Eacret v. Holmes, 215 Or 121, 333 P2d 741 (1958).... App 28
Fenwick v. State, 197 Ind. 572,
150 NE 764 (1926) ..... App 90 n50
Garner v. Alexander, 167 Or 670 (1941) ..... App 51 n8
In re Disclosure of Juror Names and Addresses,
233 Mich App 604, 592 NW2d 798 (1999)..... 25, App 22
In re Lasswell, 296 Or 121, 673 P2d 855 (1983) ..... App 24
Jury Service Resource Center, et al v. Carson, et al, 199
Ore. App. 106, 110 P. 3d 594
(2005) ..... 1-2, 23, 25, App 2-6, App 16-29, 46, 49, 54
Jury Service Resource Center, et al v. DeMuniz, et al, 340
Or. 423, __ P3d __ (2006) 2006 Ore. LEXIS 350,
reconsideration denied, 2006; 2006 Ore. LEXIS 548
(2006) ..... 1-3, 14, 23, App 1-14
Labat v. Bennett, 365 F2d 698 (C.A.5 1966) ..... App 81
League of Oregon Cities v .State of Oregon,
334 Or 645, 56 P3d 892 (2002) ..... App 28
Lemley v. State, 599 So.2d 64 (Ala App 1992) .... App 63 n24
Lewis v. State, 632 A.2d 1175,
332 Md 639 (1993) ..... 24, 26, App 75
Oregonian Pub. Co. v. U.S. Dist. Court for Dist.
Of Oregon, 920 F2d 1462 (9th Cir. 1990)
Cert denied, 501 US 1210 (1991) ..... App 27
Pantos v. City and County of San Francisco, 151
Cal. App. 3d 258, 198 Cal. Rptr. 489 (1984) .. 26, App 29
People v. Mitchell (In re Juror Names), 233 Mich. App.
604, 592 N.W.2d 798 (1999)..... 25, App 21
Pimentel v. Texas, 710 S.W.2d 764, 1986 Tex. App.
LEXIS 7695 (1986) 25
Richardson v. Louisville & NRR, 291 Ky 357, 164 SW 2d
602 (1942) ..... App 90 n50
Seattle Times Co. v. U.S. Dist. Court for Western
Dist. of Washington,
845 F.2d 1513 (9th Cir 1988)..... App 23
SER Beacon Journal Publ. Co. v. The Hon. Judge Jane
Bond et al, 98 Ohio St. 3d 146,
781 NE2d 180 (2002) ..... 25-26, App 23

SER Click v. Brownhill, 331 Or 500,
15 P3d 990 (2000) ..... App 71
SER Schrunk v. Walker et al, 308 Or 398,
780 P2d 731(1989) ..... App 50 n8, 75
SER Garrett v. Saitz, 594 S.W.2d 606, 607,
1980 Mo. LEXIS 434 (1980) 25
SER Venn v. Reid, 207 Or. 617 (1956) ..... App 51 n 8
State v. Benson, 235 Or. 291, 294, 384 P.2d 208 (1963) ... 27
State v. Burrows, 293 Or 691, 653 P2d 226 (1982) .... App 56
State v. Carlson, 39 Or 19, 62 P 1016 (1900) ..... App 51 n8
State v. Cavan, 337 Or. 433, 98 P.3d 381 (2004) 28
State v. Ciba-Geigy Corp., 240 N.J. Super. 511,
573 A.2d 944, 948 (1990) 21
State v. Delgado, 298 Or 395, 692 P2d 610 (1984) ..... App 24
State v. Evans, 100 Wn App 757, 998 P2d 373
(2000) ..... App 63 n24
State v. Fitzhugh, 2 Or 227 (1867) ..... App 51 n8
State v. Gortmaker, 60 Or App 723 (1982)
aff'd 295 Or 505 (1983) ..... App 50-51 n8
State v. Lowry, 263 N.C. 536,
139 S.E. 2d 870 (1965) ..... App 82
State v. Robertson, 293 Or 402, 649 P2d 569 (1982) .. App 24
State v. Rogers, 334 Or. 633, 55 P2d 488 (2002) 14 n2
State v. Vegas, 19 La Ann 105 (1867) ..... App 91 n50
State v. Walton, 311 Or 223, 809 P2d 81 (1991) ..... App 50

Times Mirror Co. v. U.S., 873 F.2d 1210
(9th Cir 1989) ..... App 23
U.S. v. Jackman, 46 F. 3d 1240
(2nd Cir. Conn. 1995) ..... 17-18, App 75
U.S. v. Mitchell, 136 F 865 (1905) ..... App 51 n8
U.S. v. Osorio, 801 F. Supp. 966
(D. Conn. 1992) ..... 17-18, App 72, 75

FEDERAL CONSTITUTIONAL PROVISIONS

First Amendment ..... i, 1-2, 7, 25-27, App 101, *passim*
Fifth Amendment ..... App 56, 86
Sixth Amendment .....
i, 1-2, 12-14, 17, 19, 25-27, App 21, 37-42, 56, App 101
Seventh Amendment ..... App 56
Ninth Amendment .....
.....i, 1-2, 8, 25-27, App 37-40, 49, 58, 67-69, App 101
Fourteenth Amendment .....
..... i, 1-2, 6, 8, 10, 18-19, 22, 25, 27, App 101, *passim*

FEDERAL STATUES

18 U.S.C. §243 .....i, 10, 16, App 52-53, 82-83, App 101
18 U.S.C. §2721 et seq..... App 48, 54 n12
28 U.S.C. 1257(a).....1
28 U.S.C. §1861 et seq (Federal Jury Service
and Selection Act ....13, 23, App 26, 76

Antiterrorism and Effective Death Penalty Act of 1996
(AEDPA), 110 Stat. 1214.....4 n1, 21

OREGON COURT RULE AND STATUTORY AUTHORITIES

ORCP 57A (Challenge to jury panel)..... 14, 21, App 103-04
ORS 10.215 (jury list, no public disclosure). 14, 16, App 102
ORS 10.275 (Access to records by litigants) 14, 16, App 102
ORS 136.005 (Challenge to jury by litigants)14, 21 App 102

MISCELLANEOUS AUTHORITIES

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41 Op Att'y Gen 437 (Or. 1981)..... 29

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State v. Langley (Gray III), Marion Co. Cir. Ct. No. 88C21624 (Final Judgment and Sentencing Order (Sentence of Death) entered Feb. 4, 2006) ..... i, 1-3, App 31-32, 70 n28

State v. Lueb, SC S53165 (Or. Sup. Ct. Order holding mandamus petition in abeyance) .... 12, App 69 n26, 100

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LAW TREATISES AND LEGAL JOURNALS

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Vincent L. McKusick and Daniel E. Boxer, *Uniform Jury Selection and Service Act*, 8 Harv J on Legislation 280 (Nov. 1970)..... App 48-50 n20, App 59-60 n32, 77-80 n 36, 87 n48.....

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Seymour D. Thompson & Edwin G. Merriam, *A Treatise on the Organization, Custody and Conduct of Juries, Including Grand Juries* 41 (1882)..... App 11

Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?* 92 Colum. L. Rev. 725 (1992)..... 10

Kimba M. Wood, *Reexamining the Access Doctrine*, 69 S Cal L Rev 1105 (1996) ..... App 23

MISCELLANEOUS PUBLICATIONS

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Oregon) for the period of 1973-1976," discussing gender and occupational status bias in the self-election of grand jury foremen in Multnomah Circuit Courts) ..... App 63 n25, 95 n53

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AN EVALUATION OF THE MARION COUNTY COURT ONE TRIAL/ONE DAY JURY TERM (Frank Maiocco, Jr., Lore Joplin, Office of the State Court Administrator, Oregon Judicial Department, Salem, Oregon) (Feb. 27, 1997) ..... 15, App 63 n25, 95 n 53

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(Oregon Judicial Dept., Salem, OR). App 63 n25, 94 n53

MARION COUNTY JUROR SATISFACTION ANALYSIS, MAY 20, 1999 (available from the Office of the State Court Administrator, Oregon Judicial Department, Salem, Oregon) ..... 15, App 63 n25, 96 n53

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(see: Chapter 7, Juries)..... App 63 n25, 95 n53

REPORT ON EXAMINATION OF JURY MASTER [LIST] FOR WASHINGTON COUNTY [MARCH 2002], Grant Farr, PhD, (submitted to Washington Co. Cir. Ct. 3/13/2002, *State v. Spencer*, C00-0928CR)..... App 63 n25, 96 n53

THE REPRESENTATIVENESS OF JURY POOLS AND TREATMENT OF JURORS IN THE MULTNOMAH COUNTY, OREGON, COURTS AUG, 1993 (available from the Multnomah County Bar Association, Portland, Oregon) ..... App 63 n25, 95 n53

PETITION FOR A WRIT OF CERTIORARI

OPINIONS AND ORDERS BELOW

The opinion of the state supreme court (App 1-14) is reported at 340 Or. 423 (2006); 2006 Ore. LEXIS 350. The opinion of the state court of appeals (App. 16-29) is reported at 199 Ore. App. 106, 110 P.3d 594 (2005). The opinion of the Marion County Circuit Court, Civil Case No. 03C11907 (excerpts provided at App 29-30) was issued on Sept. 10, 2003, and is unreported.

The Final Judgment and Sentencing Order (sentence of death) pertaining to Petitioner Langley was entered on February 4, 2006 in Marion County Circuit Court, *State v. Langley (Gray III)*, Criminal Case No. 88C21624 (excerpts provided at App 31-32) and is unreported.

JURISDICTION

The supreme court's opinion was filed on April 27, 2006. Petitioners' timely petition for reconsideration was denied on May 23, 2006, and entered on May 25, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES

The First, Sixth, Ninth and Fourteenth Amendments (Due Process and Equal Protection Clauses) to the United States Constitution, and 18 U.S.C. 243 (text of the provisions is set forth at App 101).

STATEMENT OF THE CASE

This case raises two important, recurring questions relating to who has standing to vindicate federal civil and constitutional jury-related rights, and whether the right to standing and an opportunity to

vindicate those federal rights as they pertain to state court jury service, may be burdened by a state.

Petitioners sought access to state court jury source, master, and term jury lists, offering to abide by any protective order. Defendants denied Petitioners' requests, citing to a recently enacted statute making state court jury lists "confidential" and prohibiting a court from granting the public, including Petitioners, any access to the lists (text of the pertinent statutory and rule provisions is set forth at the back of the appendix, App 102-104). On February 25, 2003, Petitioners filed a civil action in Marion County Circuit Court (No. 03-C11907) seeking a declaratory judgment granting them (1) standing to access state court jury lists, and (2) an unburdened opportunity to vindicate their federal statutory and constitutional rights related to state court jury service. Petitioners relied upon the First, Sixth, Ninth and Fourteenth Amendments (App 35-39). In October 2003, the civil trial court summarily denied all of Petitioners' federal constitutional claims (App 29-30). On April 13, 2005, a three-judge panel of the Oregon Court of Appeals unanimously granted Petitioners relief under the First Amendment (App 16-29). On April 27, 2006, a five-justice panel of the Supreme Court of Oregon unanimously reversed the decision of the Court of Appeals, and denied all of Petitioners' federal constitutional claims (App 1-14). Petitioners' sought reconsideration of the court's decision on their First Amendment claim, and sought clarification of the Court's denial of Petitioner's claims under the Ninth, and Fourteenth Amendments (App 58-98). The court below denied reconsideration without further briefing or argument (App 14-15). Petitioners raised all of their federal claims at each stage of the proceedings below: the Circuit Court trial level (App 35-40); in front of the Court of Appeals of Oregon (App 40-45); and in front of the Oregon Supreme Court (App 46-98).

Petitioner Jury Service Resource Center is a non-profit organization, seeking to access and audit state jury lists for the benefit of the public, including the vindication of federal jury-related rights (App. 36-38, 70 n28-29). Petitioner David Shannon is a prospective state juror, seeking to educate himself about the jury system and vindicate federal jury related rights (App. 37-38, 70 n28).

Petitioner Robert Langley, Jr., at the time this action was filed (2003), was preparing his defense in state court against the death penalty. In June 2002, Langley sought access to the jury lists to investigate the jury selection system to be used in his case, and vindicate his own federal constitutional jury-related rights, and the federal jury-related rights of prospective Marion County jurors (App. 35-40). Defendants and the criminal trial court denied his requests for the lists on the bases that he had no public right to access the lists, and as a litigant he had not filed a sworn prima facie challenge to the jury system. Langley gave Notice to his criminal court and opposing party of his intention to exhaust his state remedies regarding access to the jury records in this civil action, and his need for a stay of his trial until this case was resolved (App 39-40) to which the state did not object.

Subsequent to the decision of the Court of Appeals granting Petitioners' access to the lists under the First Amendment, the State petitioned the Oregon Supreme Court for review of that decision (petition filed July 6, 2005). Prior to the filing of the state's brief on the merits below (brief filed on Nov. 6, 2005), the criminal trial court (on August 29, 2005) and the court below (on October 4th and 10th, 2005 (OJIN entries 11-14) denied Langley's requests for a stay of his death penalty trial until this case was resolved. On November 9, 2005, a jury returned a verdict of death against Langley (App 32, 70 n28). On January 10, 2006 this case was argued and submitted below (App 1). On February 4th, 2006, a judgment and sentence of death was entered against Langley (App 31-

32). His death sentence is currently on automatic and direct appeal to the Oregon Supreme Court (SC S53206).

Because Petitioner Langley was a Plaintiff below, and because the Court's decision in this case could affect Petitioner Langley's death sentence (despite the fact that the Court is not being asked to review the merits of Langley's conviction or death verdict within this Petition), counsel has - - in accordance with Rule 14.1(a) -- identified the Petition as involving "a capital case.[2]

REASONS FOR GRANTING THE WRIT

The two narrow issues presented here are recurring, and of great public importance as they are central to the vindication of federal civil and constitutional jury-related rights. Standing and opportunity to inspect state court jury lists, and the ability to vindicate federal rights related thereto, go to the core of the administration of civil and criminal justice in state courts and to the integrity of all courts. The opinion

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[2] In so identifying this Petition, Counsel further relies on the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Ed. 2003) Guideline 10.8 (The Duty to Assert Legal Claims) (App 34), and the relevant mandates contained within the Anti-Terrorism and Effective Death Penalty Act. Before including Langley in this Petition, counsel provided notice to, and heard no objection from, Langley's court-appointed state appellate defense counsel (Mr. Frank Stoller, Oregon State Bar Lic. No. 77084). Counsel for Defendants here (the State Attorney General and State Solicitor General) also represent the State's interest in Langley's death sentence.

If a question or an objection arises regarding Petitioner Langley's appearance here, Langley respectfully requests an opportunity to be heard by the Court on the merits of such issue(s).

below, denying standing and an opportunity to vindicate federal jury-related rights to *all* Oregon state prospective jurors and to many state court litigants, is in blatant, open conflict with the Court's opinions, and misapprehends and nullifies controlling principles of federal constitutional law. The opinion below also conflicts with other state appellate court rulings, further demonstrating the urgent need for a prompt and nationally binding rule of law.

I. The Issues Presented are Recurring and of Great Public and Practical Importance.

The decision below denies standing and opportunity not only to Petitioners, but to all Oregon prospective state court jurors, and to many Oregon state court litigants. This deprivation is ongoing and recurring. Restoring the ability of Petitioners and like persons to gain an opportunity to inspect state court jury lists is of national importance for three reasons.

First, as the Court has recently emphasized, jurors are at the core of this country's system of justice, especially the administration of criminal justice. *Johnson v. California*, 545 U.S. 162, 162 L. Ed. 2d 129, 140 (2005) (*Batson* challenge); *Miller-El v. Dretke*, 545 U.S. 231, 162 L. Ed. 2d 196, 212, 234 (2005) (*Batson* challenge); *Blakely, Jr. v. Washington*, 542 U.S. 296, 301, 306 (2004) (jury as factfinder for sentencing is a "fundamental reservation of power in our constitutional structure"); *Ring v. Arizona*, 536 U.S. 584, 609-610 (2002) (jury as factfinder in death penalty sentencing), and *Apprendi v. New Jersey*, 530 U.S. 466, 489-490 (2000) (jury as factfinder for sentencing).

> [C]ommunity participation in the administration of the criminal law...is not only consistent with our democratic heritage but is also crucial to public confidence in the fairness of the criminal justice system.

Taylor v. Louisiana, 419 U.S. 522, 530 (1975). *See also Miller-El v. Dretke*, 545 U.S. 231, 162 L. Ed. 2d 196, 212, 232, 234.

Second, as the Court rightly continues to emphasize, unlawful discrimination and systematic errors in jury selection (intentional or otherwise) harm not only the litigants, but also the affected jurors, the court, and the community at large. *Johnson v. California*, 545 U.S. 162, 162 L. Ed. 2d 129, 140 (2005); *Miller-El v. Dretke*, 545 U.S. 231, *supra*; *Campbell v. Louisiana, 523* US 392, 398 (1998) (selection of grand jury); *Powers v. Ohio*, 499 U.S. 400, 410 (1991) (*Batson* challenge).

> The harm is not only to the accused, indicted as he is by a jury from which a segment of the community has been excluded. It is to society as a whole. "The injury is not limited to the defendant -- there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." ***[D]iscrimination on the basis of race in the selection of members of a grand jury thus strikes at the fundamental values of our judicial system and our society as a whole[.]

Rose v. Mitchell, 443 U.S. 545, 556 (1979) (citing to *Ballard v. United States*, 329 U.S. 187, 195 (1946)).

The Court's keen perception of the serious harm done, and its dedication to fulfilling its own duty to vindicate the federal rights involved, is reflected in an "unbroken line" of the Court's jury-rights-related cases. *Rose v. Mitchell*, 443 U.S. 545, 551-552 (1979) (race based exclusion of prospective jurors in violation of the Fourteenth Amendment) (citing to *Strauder v. West Virginia,* 100 U.S. 303 (1880); *Neal v. Delaware,* 103 U.S. 370, 394 (1881*); Bush v. Kentucky,* 107 U.S. 110, 119 (1883*); Carter v. Texas,* 177 U.S. 442 (1900); *Rogers v. Alabama,* 192 U.S. 226 (1904); *Pierre v. Louisiana,* 306

U.S. 354 (1939); *Smith v. Texas,* 311 U.S. 128 (1940), *Hill v. Texas,* 316 U.S. 400 (1942); *Cassell v. Texas,* 339 U.S. 282 (1950); *Reece v. Georgia,* 350 U.S. 85 (1955); *Eubanks v. Louisiana,* 356 U.S. 584 (1958); *Arnold v. North Carolina,* 376 U.S. 773 (1964); *Carter v. Jury Comm'n,* 396 U.S. 320, 338 (1970); *Alexander v. Louisiana,* 405 U.S. 625, 628 (1972); and *Castaneda v. Partida,* 430 U.S. 482, 492-495 and n 12 (1977)). See also, *Norris v. Alabama,* 294 U.S. 587, 589 (1935) (jury discrimination case, discussing "duty" of the Court "to determine whether in truth a federal right has been denied" and to "safeguard[] constitutional rights").

Third, the issues presented are important because the Constitution so provides: at least four fundamental jury-related rights are embraced and secured by the U.S. Constitution. These rights are not mutually exclusive: the Court has made clear that these rights often intersect and intertwine.

The First Amendment provides the public with the right to access criminal trials, in order to witness how justice is administered, and to assist in that administration by being present. This Court protects the public's First Amendment right to view state court criminal proceedings, *Richmond Newspapers v. Virginia,* 448 U.S. 555, 581 (1980) (absent overriding interest articulated in findings, the trial of a criminal case must be open to the public); *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596, 610 (1982) (no justification for mandatory closure of criminal court proceeding, case-by-case determinations must be made); *Press Enterprise v. Superior Court of California (Press-Enterprise I)* 464 U.S. 501, 513 (1984) (government failed to show a compelling governmental interest, narrowly tailored, to justify state trial court sealing six-weeks of voir dire and transcript thereof from public view); *Press-Enterprise v. Superior Court of California (Press-Enterprise II),* 478 U.S. 1, 10-13

(1986) (public access to criminal trials and selection of jurors is essential to proper functioning of the criminal justice system; preliminary hearings included).

The Sixth Amendment guarantees the right to a jury trial, a "fundamental right" made applicable to the states by the Fourteenth Amendment, *Duncan v. Louisiana*, 391 U.S. 145, 154, 158 (1968). This Sixth Amendment right also reserves power to members of the public in their capacity as *jurors*.

> That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches jury trial is meant to ensure their control in the judiciary.

Blakely v. Washington, 542 U.S. 296, 305-306 (2004). The Federal Constitution will not suffer a "mantle of secrecy" draped over state court proceedings, *In re Oliver*, 333 U.S. 257, 273 (1948). The Sixth Amendment also guarantees that juries shall be drawn from a fair cross section of the community, as part of the guarantee to a fair and impartial trial. The Court upholds a state criminal defendant's federal jury-related rights. See *Duren v. Missouri*, 439 U.S. 357 (1979) and other cases cited *supra*.

The Ninth Amendment protects the unenumerated rights of the people, which, Petitioners contend, includes the fundamental right of the people – including prospective jurors and litigants' -- to inspect the actual jury lists used by their public court to select and summons members of the public to appear and perform public adjudication of the people's legal claims.

The Fourteenth Amendment guarantees due process and equal protection to prospective grand jurors, grand jury forepersons, petit jurors, and litigants who

have been indicted or who are facing a jury trial. *Rose v. Mitchell, supra.*

> A State cannot, consistent with due process, subject a defendant to indictment or trial by a jury that has been selected in an arbitrary and discriminatory manner, in violation of the Constitution and laws of the United States. Illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process. They create the appearance of bias in the decision of individual cases, and they increase the risk of actual bias as well.

Peters v. Kiff, 407 U.S. 493, 502-503 (1972). As the Court reiterated in *Rose v. Mitchell*:

> "No State is at liberty to impose upon one charged with crime a discrimination in its trial procedure which the Constitution, and an Act of Congress passed pursuant to the Constitution, alike forbid. Nor is this Court at liberty to grant or withhold the benefits of equal protection, which the Constitution commands for all, merely as we may deem the defendant innocent or guilty. *Tumey v. Ohio*, 273 U.S. 510, 535 [(1927)]. It is the State's function, not ours, to assess the evidence against a defendant. But it is our duty as well as the State's to see to it that throughout the procedure for bringing him to justice he shall enjoy the protection which the Constitution guarantees.***"

Rose v. Mitchell, 443 U.S. at 557 (quoting *Hill v. Texas*, 316 U.S. 400, 406 (1942)).

The Court upholds and protects the federal civil and constitutional rights of individual prospective state jurors to receive equal and fair treatment regarding their eligibility for jury service *per se*, as well as their opportunity to be fairly treated during the selection process itself. *Powers v. Ohio*, *supra* (and cases cited therein); *Carter v. Jury Commission*, 396 U.S. 320, 329-30

(1970) ("Defendants in criminal proceedings do not have the only cognizable legal interest in nondiscriminatory jury selection...[T]he State...must hew to federal constitutional criteria in ensuring *that the selection...is free of racial bias.*""); *Turner v. Fouche*, 396 U.S. 356 (1970) (racial bias in jury selection). The Court affords the same to civil litigants and jurors. *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220 (1946); *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 1364 (1991) (*Batson* challenge during civil litigation). See also, Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right Is It, Anyway?* 92 Colum. L. Rev. 725 (1992) (paying attention to the rights of excluded jurors will bring needed coherence to the evolving law of jury discrimination).

Additionally, the Federal Civil Rights Act, 18 USC §243 makes it a federal crime for anyone, including a state actor, to discriminate against a prospective juror based on that juror's race, color, or previous condition of servitude. See e.g., *Rose v. Mitchell*, 443 U.S. 545, 553, and n 5, and 583 (1979). The Court has held the Civil Rights Act, and the federal constitution, to impose an affirmative duty on jury system administrators "not to pursue a course of conduct in the administration of their office which would operate to discriminate in the selection of jurors on racial grounds." *Hill v. Texas*, 316 U.S. 400, 404 (1942) (citing to *Neal v. Delaware*, 103 U.S. 370 (1881) and *Pierre v. Louisiana*, 306 U.S. 354); see also *Avery v. Georgia*, 345 U.S. 559, 561 (1953) (citing to cases); *Norris v. Alabama,* 294 U.S. 587, 589 (1935) (citing to cases); Alexander v. Louisiana, 405 U.S. 625, 628 n8 (1972) (Civil Rights Act "affirms and reinforces this [Fourteenth Amendment] constitutional right" relating to equal protection in jury selection).

The Court has recently dealt with a case of similar national importance. When California conditioned the satisfaction of the first step of a *Batson* challenge on

proving that discrimination was "more likely than not," compared to only having to raise "an inference" that discrimination was occurring, this Court held that the state action conflicted with federal law and was unconstitutional. *Johnson v. California*, 545 U.S. 162, 162 L. Ed. 2d 129, 141 (2005). Similar to *Johnson*, this four-year-old case presents narrow but important constitutional issues pertaining to state action that deprives persons of standing, and imposes on them evidentiary hurdles, ultimately obstructing the vindication of federal jury-related rights.

A. This Case Squarely Presents the Issues.

Petitioners here have raised and preserved the federal issues at each stage of the case. Indeed, this case was brought to settle important federal constitutional issues surrounding access to state court jury lists.

II. The Decision Below Directly Conflicts with the Court's Opinions on Standing and Opportunity to Vindicate Federal Rights.

The Court has long held that where a federal right exists, a meaning opportunity to vindicate that right also exists. *Reece v. Georgia*, 350 U.S. 85, (1955) (the right to challenge the grand jury "presupposes an opportunity to exercise that right") citing to *Carter v. Texas*, 177 U.S. 442 (1900) (opportunity to challenge grand jury under Constitution and Civil Rights Act), and *United State v. Gale,* 109 U.S. 65, 72, (1883) (post-verdict challenge to grand jury). See also *Wardius v. Oregon*, 412 U.S. 470, 474 n6 (1973) (discovery rights) (the Court is suspicious of state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial). Here, the State compiles the lists, but denies Petitioners the right to inspect the lists.

Whereas Petitioner Langley was *eligible* for a state grant of standing to seek an opportunity to inspect the lists, he could not satisfy the state's evidentiary burden (he did not have facts about a known challenge to put in an affidavit). As acknowledged by Defendants and the court below, other state court defendants share in this frustration (App 46, 66 n26, 99-100). Petitioners JSRC and Shannon are *not eligible* for a state grant of standing to seek the lists. Oregon prospective jurors have *no opportunity* to inspect the lists, let alone "ample opportunities" to vindicate their rights such that members of the Court understand to exist in this nation. *Campbell v. Louisiana,* 523 U.S. 392, 408 (1998) (Thomas, J. and Scalia, J., concurring in part and dissenting in part).

A challenge asserting a violation of the Sixth Amendment's fair cross-section requirement, (where the challenge is not a facial challenge to a jury service eligibility standard *per se*), is normally based on a relatively straight forward analysis of a statistically significant number of jury venires. The current standard for evaluating the challenge was set by the Court in *Duren v. Missouri*, 439 U.S.357 (1979). In relevant part:

> In order to establish a prima facie violation of the fair cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process.

Duren v. Missouri, 439 U.S. at 364.

The evidence adduced typically includes a comparison of data about prospective jurors who appear

on the jury lists with data about the jurors' community made available from the U.S. Census Bureau. See *Duren v. Missouri*, 439 U.S. at 365. As the Court has recognized and held, access to the jury lists is essential to investigating whether a Sixth Amendment violation actually exists, *Test v. United States*, 420 U.S. 28, 30 (1975), as well as to proving it. The empirical, relevant facts needed for the challenge are contained in the actual lists used by the court, and nowhere else. As the Court stated in *Taylor v. Louisiana*:

> The jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.

Taylor v. Louisiana, 419 U.S. 522, 528 (1975). *Accord, Duren v. Missouri*, 439 U.S. 357, 364 (1979). And, as with any federal jury-related challenge, the challenger has the burden of alleging and proving the challenge.

This fact-gathering task for a Sixth Amendment challenge differs significantly from that faced by a litigant concerned about investigating and raising a possible *Batson* challenge. The Court has held that evidence for the prima facie case of a *Batson* challenge need only come from the immediate trial, based on what is occurring in the courtroom, as witnessed by everyone in the courtroom, including the party having standing to bring the challenge. *Batson*, 476 U.S. 79, 95. But Sixth Amendment challenges are different. Access to the jury lists, compiled earlier and outside of the courtroom, is essential.

For an Oregon state court criminal defendant wishing to determine whether a Sixth Amendment challenge exists, he obviously has a problem. Neither he nor his defense attorney is allowed to simply go down to the court administrator's office and, under her or his supervision, directly inspect the lists to answer the

defendant's simple question. He must first *earn* an opportunity from *the state* to vindicate his federal jury related rights.

Currently, the only persons who are allowed to inspect the Oregon state court jury lists are those litigants who are facing a state court jury trial, who have already filed a challenge to the jury system, and who assert an additional need to obtain the official lists as evidence to support their previously asserted, known challenge. ORS 10.215, ORS 10.275, ORS 136.005, ORCP 57A (App 102-104). *Jury Service Resource Center et al v. DeMuniz et al*, 340 Or 423 (2006); *State v. Rogers*, 334 Or 633, 55 P3d 488 (2002) (death penalty case, mandamus, defendant's affidavit held barely sufficient to set forth a *prima facie* case). There are no other exceptions, including for instance, allowing inspection by a federal agent investigating a civil rights complaint. *Jury Service Resource Center et al v. DeMuniz et al*, 340 Or 423 (2006).

To be sure, the court below, in a separate decision, has made clear that the actual *merits* of an asserted prima facie case need not be *ruled on* in the litigant's favor as a condition precedent to the trial court granting the seeker access to the records. *State v. Rogers*, 334 Or. 633, 55 P2d 488 (2002).[3] But *JSRC* and *Rogers* make clear that (1) only litigants facing a jury trial have standing to file a motion to obtain access to the records and vindicate federal Sixth Amendment rights; (2) a challenge and sufficient accompanying affidavit must be filed. The legislative history of the passage of the 2001

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[3] Rogers did not assert any federal right to access the state court jury records. The trial court found his affidavit insufficient to allege a prima facie case and denied his motion for access to the lists. Rogers filed a mandamus, and the court ruled that, in their opinion, the affidavit did suffice. *State v. Rogers*, 334 Or 633, 55 P2d 488 (2002).

statute (of record in this case) makes clear that the state intended to limit access to state court jury records to this small group of litigants: those who *could* assert a prima facie case without first inspecting the lists and were *willing* to do so.

For state court defendants who have already have sufficient facts or who choose not to pursue a jury challenge, the decision below is irrelevant. But for defendants who lack sufficient facts, and who want to avail themselves of an opportunity to vindicate their federal jury-related rights, they face an insurmountable hurdle that only the Court can force Defendants to remove.

Petitioner Langley's efforts (as excerpted and set forth in the App. 35-40) serve as an example. In 2002, Petitioner Langley, facing a death penalty trial, frankly admitted to the criminal trial court that he lacked facts to file a challenge to the jury system (App 37). Convicted in 1989 (App 31) and imprisoned on Oregon's death row since that time, he had been restricted in his ability to empirically monitor the local court system. The only available studies of the Marion County Circuit Court jury system were two in-house studies done by the state in the late 1990s (App 95-96 ##11-12). The data sets used in the study were of no empirical relevance to Langley's case, yet the existence of the studies showed that the state allowed *itself* to access and study the jury lists, and Langley asserted that he should be allowed to do the same.

Langley was aware that in Oregon, the State Court Administrator (SCA) is mandated to compile the annual master jury lists from public agency lists (the voter registration lists and the Oregon Dept. of Transportation lists (drivers and identification card holders)) (App 3, 59-62). Neither agency keeps a copy of the actual lists provided by them to the SCA. Performing an empirical

analysis on "next best" data lists (e.g., current 'snapshots' of agency lists) will not reveal any data about the actual official jury lists in use. This is because the SCA runs the agency data lists through special computer software to manipulate the raw agency lists into the refined, official jury lists (e.g., by merging and deleting agency data). Only by inspecting the *refined* and *official* source, master and term jury lists, can empirical data relevant to a federal challenge be accessed and investigated. No other list analysis matters.

Langley filed a public records request, and a motion before his criminal trial court (serving copies on the state and trial court administrators), seeking access to the jury lists in order to determine whether there was a basis for a jury challenge due to state computer system errors or the actions of state court personnel. Within both requests, Langley sought access to vindicate his federal rights and asserted third party standing to vindicate the federal rights of prospective Marion County jurors, citing to *Powers v. Ohio*, 499 U.S. 400 (1991), and offered to abide by any protective order. The state denied his request, citing to Oregon Revised Statutes 10.215 and 10.275 (App 102-104). Before attempting to seek extraordinary relief in federal court, Langley gave notice to his criminal trial court that he would attempt to exhaust his state administrative remedies under the Oregon Public Records Act in a civil action, which he (as a state defendant had a right to do), again asserting his federal rights from within both the civil and criminal action, and requesting that his criminal case not go to trial until the civil action was resolved (App 39-40). The state did not object.

For Petitioner Langley it was not possible to file a sworn affidavit containing *any* substantive empirical facts detailing his court's failure to draw jurors from a representative cross section of the community (a prima

facie Sixth Amendment case) without first gaining access to, and inspecting and analyzing, the actual, relevant, historical jury lists used by the court (App 37, 52). Petitioners concede that in other communities – those having a sufficiently diverse racial population -- it may be possible to collect empirical facts sufficient to assert a race-based prima facie case and cross-section challenge. See e.g., *U.S. v. Osorio,* 801 F Supp 966 (D. Conn. 1992) (challenge initiated with race-based affidavits containing lay testimony; inspection of jury lists revealed that all residents from two major cities (those having most of the state's minority population) were erroneously dropped via data input error during master list compilation); *U.S. v. Jackman*, 46 F.3d 1240 (2nd Cir. Conn. 1995) (same); *Azania v. State*, 778 NE2d 1253 (Ind. 2002) (same). In such communities, through the use of judicial notice and/or careful (and expensive) surveying, it may be possible to submit an affidavit factually averring a race-based Sixth Amendment violation without actually seeing the lists first (although inspection of the Connecticut and Indiana lists early on would have revealed the problems sooner, with less expense, and with less injury to all).

The cheapest, least invasive, and arguably the best way to competently determine whether cross-section problems exist (race and other characteristics) is to carefully and expeditiously analyze data from a statistically significant number of court jury lists, which is what Petitioners sought to do. In particular, by assigning each prospective juror's address (as shown on the jury list) to their official census track, while simultaneously assigning gender (based on first name) and tracking age (by birth year only), certain cross-section analyses can be performed fairly quickly. Indeed, the U.S. Census Bureau provides software to the public to allow it to assign addresses to their respective census tracks.

With regard to a Fourteenth Amendment due process and/or equal protection challenge, and excluding cases of direct or admitted acts of discrimination, access to the jury lists would again be required in order to discover whether there was an intentional substantial underrepresentation of distinctive groups on the lists, and if so, where in the selection process it was occurring. *Castaneda v. Partida*, 430 U.S. 482, 487 (1977) (racial discrimination in grand jury system, statistical data from 10 years of grand jury lists presented); *Alexander v. Louisiana*, 405 U.S. 625, 629-30 (1972).

As case law reflects (e.g., *U.S. v. Osorio*, *supra*) the compilation of the original source and master jury lists on computerized systems requires a contribution of human labor. Because computerized jury systems are nonetheless accessed and operated by people working at court computer terminals, there are opportunities throughout the process to purposefully discriminate despite the computerized nature of such systems. Petitioner JSRC uncovered this in Lincoln County. As the record reflects (App. 70 n29, 97 n55), JSRC discovered – during an inspection of the system – that a court clerk was purposefully refusing to mail out jury summons to prospective jurors over 70 years of age even though they had been randomly selected for jury service and were eligible to serve under state law.

Absent a frank (and possibly criminal) confession by a jury system operator or clerk, access to the lists would also be needed to verify that an individual juror was either (a) actually included on the larger list(s) before being *erroneously dropped or wrongfully excluded* from a list via prohibited discriminatory animus, or else (b) was never actually included on a larger jury list before being *wrongfully added in to* the venire in violation of the random selection mandate.

Such acts of discrimination can be quickly ascertained by comparing later lists with earlier lists, and inspecting at points where the jury clerk has the ability to remove or add prospective jurors. Without access to the lists, and relying only on a subjective analysis of the physical characteristics of jurors comprising any late-stage jury pool (the voir dire panel), a litigant might never suspect, let alone detect, such discrimination. And if a litigant did suspect discrimination or error, his or her lay speculation about it (raised during voir dire) is easily rebutted by lack of empirical proof coupled with lay speculation about its non-existence. Indeed, unlike a *Batson* challenge, "proof" of a Sixth or Fourteenth Amendment challenge is unlikely to emerge during voir dire. Again, at this late stage of jury selection it is hard (if not impossible) to ascertain whether or why certain cognizable groups aren't on the panel, and whether it is just a fluke of random selection, or whether there is a problem with the system. Assertions of 'a problem' based on vague suspicions about the panel raised on the day jury selection is set to begin are grossly insufficient *to aver a prima facie case*, and trial courts are justified in so ruling. This is why access to the lists is so important to the vindication of jury-related rights. The importance of access is not a new revelation: detailed and impassioned testimony before Congress in 1966-67 set forth exactly how making jury lists "confidential" obstructed the vindication of federal jury-related rights (App 76-90).

Again, based on the decision below, the only persons with standing to ask for an opportunity to look at the jury lists to determine whether a Fourteenth Amendment due process or equal protection challenge exists, are those litigants facing a jury trial who already have other facts to file a jury challenge, and who decide to file a challenge, etc. However, assuming such a litigant exists, he or she has no legal or ethical duty to file a Sixth or Fourteenth Amendment jury challenge, whether on her

or his own behalf or on the behalf of Petitioners or like others. As the Court has recognized:

> Often the interests of the accused are not advanced by challenges that would only delay the inevitable date of prosecution...A prospect of plea bargaining, the expectation or hope of a lesser sentence, or the convincing nature of the evidence against the accused are considerations that might well suggest the advisability of a guilty plea without elaborate consideration of whether pleas in abatement, such as unconstitutional grand jury selection procedures, might be factually supported.

Tollet v. Henderson, 411 US 258, 268 (1973).

The opinion below blatantly conflicts with federal law. The Court has consistently acknowledged that prospective jurors, like litigants, have standing to vindicate their federal jury-related rights. *Powers v. Ohio*, 499 U.S. 400, 416 (1991); *Campbell v. Louisiana*, 523 O.S. 392, 400 (opinion) ("It is axiomatic that one has standing to litigate his or her own due process rights."); and at 408 (Thomas, J., Scalia, J., concurring in part, dissenting in part) (the defendant "has standing to raise...his own due process right" regarding discrimination during jury selection, and "there are ample opportunities for prospective jurors whose equal protection rights have been violated to vindicate those rights, rather than relying upon a defendant of another race to do so for them").

In granting litigants facing a jury trial with rare third-party standing to vindicate the rights of prospective jurors, *Powers v. Ohio*, 499 U.S. 400, 416 (1991), *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 629-30 (1991); the Court did not strip prospective jurors of their standing to personally litigate their federal constitutional claims. This case squarely presents the Court with the narrow question of whether a state may do so.

As the Court no doubt ascertains, the decision below also creates a major problem for client and counsel. Petitioners agree that the due diligence requirement for investigating and raising jury challenges is reasonable. *Anderson v. Gladden* 234, Or. 614, 383 P2d 986 (1963) (challenges to venire must be brought prior to trial); *State v. Benson*, 235 Or. 291, 294, 384 P.2d 208 (1963) (same), *Tollett v. Henderson, supra.* Barring extraordinary circumstances, allowing litigants to wait to raise a meritorious challenge until after their plea is entered, their jury sworn, or a verdict returned, is unfair to all of the parties involved, including the taxpayers.

But a due diligence rule only works if there is a meaningful opportunity for a litigant to diligently gain pre-trial notice of the basis for a jury challenge. The stakes are highest, obviously, in death penalty cases, such as for Petitioner Langley. *See e.g.,* ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Ed. 2003), Guidelines 10.7 (Investigation; Commentary); 10.8 (The Duty to Assert Legal Claims) (10.10.2 (Voir Dire and Jury Selection) (App 33-35); and 1989 Guideline 11.4.1 (Investigation).[4] These duties must be undertaken with an appreciation of the mandates of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214. The Court has noted that defense counsel's "failure to inform himself of facts that would have shown the existence of a [jury-related] constitutional claim" may form the basis for federal habeas relief, *Tollet v. Henderson*, 411 U.S. at 267 (1973). See also *Williams v. Georgia*, 349 U.S. 375 (1955) (extraordinary facts underlying post-conviction motion for

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[4] *See also*, ABA Guidelines (1989 Edition), Guideline 11.4.1 (Investigation) Commentary *** *Without investigation, counsel's evaluation and advice amount to little more than a guess.*

new state trial, based on racial discrimination in selecting death penalty jury, facts supporting challenge allegedly unknown to diligent trial counsel). Where the state itself makes it impossible for counsel to investigate those facts, by obstructing standing and the opportunity to do so, narrow yet extremely important federal questions are presented.

If litigants are note timely afforded a meaningful opportunity to ascertain whether the state has complied with federal laws governing jury selection and service, and to thereby assert and vindicate their federal claims, any pre-trial deadline for such challenges is clearly unconstitutional. The basement floor of Due Process may be dirt, but it's a rock solid layer of rich federal constitutional dirt. In light of the ruling below, the question of whether an Oregonian state court criminal defendant (such as Mr. Krueger or Mr. Lueb, App 46, 69, 99-100), who is intent on investigating his grand and/or petit jury pool, should attempt to litigant this issue in federal district court, in order to be afforded timely protection of his federal rights, and not be held to have waived this right or remedy by such failure to act, is an open and urgent question. *See e.g., Strauder v. West Virginia*, 100 US 303 (1879), *Reece v. Georgia*, 350 U.S. 85 (1955); *Cooper v. Board of Directors of the Little Rock, Arkansas, Independent School District,* 358 U.S. 1 (1958); *Georgia v. Rachel*, 384 U.S. 780 (1966), *Tollett v. Henderson,* 411 U.S. 258 (1973); and *Vasquez v. Hillery*, 474 U.S. 254, 106 S Ct 617, 88 L Ed. 2d 598 (1986). The usual answer, under *Younger v. Harris*, 401 U.S. 37 (1971), is a flat "no," as long as a state proceeding proves an adequate opportunity for the complaining party to present its federal claims. *Middlesex County Ethics Comm.,* 457 U.S. 423, 432 (1982). Because Petitioner Langley's death penalty trial is over, this exact question is not before the Court. But the existence of that question, and of claims similar to those filed in *Dombrowski v. Pfister* 380 U.S. 479, 482 (1965) (state action allegedly

being taken to discourage persons from asserting and attempting to vindicate federal constitutional rights) merit the Court's scrutiny and granting of this Petition.

Finally, the decision below also conflicts with this Court's reasoning and analysis under the First Amendment, as set forth at part *IV* below. The appellate bench of Oregon is itself divided on how to resolve Petitioners' First Amendment claims. Compare *JSRC v. Carson*, 199 Or. App. 106, 117-123 (2005) (finding a right of access under the First Amendment) with *JSRC v. De Muniz*, 340 Or. 423, 428-435 (2006) (finding no First Amendment right of access, finding that "there is no historical support for the kind of openness that plaintiffs demand," and "public access plays no significant role in the official and largely rote function of collecting and winnowing names for jury lists."). The confusion is found at the trial level: Oregon Circuit Court judges have ruled in favor of public inspection (App 72-73, 92 n52).

III. The State Courts are Divided Over Whether the Federal Constitution Forbids A State From Refusing Public Inspection of State Court Jury Lists

The ruling below conflicts with the decisions of other state appellate courts, particularly those who have relied on *Test v. United States*, 420 U.S. 28, 95 SCt 749, 42 L Ed 2d 786 (1975), to guide their decisions. Petitioners readily acknowledge that *Test*, concerning a cross-section challenge, arose under the Federal Jury Selection and Service Act, which is not at issue here. However, the Court's core analysis in *Test* is realistic, relevant and compelling:

> [W]ithout inspection, a party almost invariably would be unable to determine whether he has a potentially meritorious jury challenge. Thus, an unqualified right to inspection is required not only by the plain language of the [federal] statute [28

> USC 1861 et seq], but also by the statute's overall purpose of insuring 'grand and petit juries selected at random from a fair cross section of the community.'

Test v. United States, 420 US 28, 30 (1975).

The states are split on whether the Court's principled analysis in *Test* should guide their own decision whether to grant access to jury records. Whereas Oregon has clearly rejected it (Petitioners cited to *Test* at all stages of this case), the Court of Appeals of Maryland expressly cited to and relied upon *Test* in deciding to grant access to the jury records under its statute. *Lewis v. State*, 332 Md. 639, 647-9, 632 A.2d 1175, 1179 (1993). That court paid notice to the fact that Maryland (like Oregon, App 87-89 n49) had patterned the state's relevant jury record statutes upon the Federal Jury Selection and Service Act. The Superior Court of New Jersey cited and relied upon *Test* and its progeny in decided to grant access to the jury records, holding:

> It would be virtually impossible for defendants who are endeavoring to ascertain if a successful attack on the grand jury selection process can be advanced if the facts necessary to prove a defect in the selection process are withheld.

State v. Ciba-Geigy Corp., 240 N.J. Super. 511, 520, 573 A.2d 944, 948 (1990).

In acknowledging the constitutional issue presented when a court denies a litigant access to jury system information pre-trial, the Supreme Judicial Court of Massachusetts cited to *Test*, but then avoided reaching the constitutional issue, by holding that the defense counsel hadn't pursued obtaining the information vigorously enough. *Commonwealth v. Campbell, Jr.*, 378 Mass. 680, 692, 393 N.E.2d 820, 828 (1979). The Supreme Court of Missouri acknowledged *Test*, but held that the *Test* was not based on constitutional grounds, and noted

that Missouri was not bound by the federal act and had no similar state legislation. *State ex rel Garrett v. Saitz,* 594 S.W.2d 606, 607, 1980 Mo. LEXIS 434 (1980). After pointedly announcing that this Court had never announced a right of inspection based on federal constitutional grounds, *State ex rel Garrett v. Saitz, ibid,* n2, the state court held:

> The Court is bound, however, by the United States Supreme Court's determination of a state court defendant's constitutional right to have his case considered by a grand jury drawn from a fair cross-section of his community. This cross-section requirement would be without meaning if a defendant were denied all means of discovery in an effort to assert that right.

State ex rel Garrett v. Saitz, 594,S.W.2d 606, 607 (ordering the circuit court to provide the defendant-relator with certain jury information).

On the other end of the spectrum, the Court of Appeals of Texas has flatly held that *Test* has no persuasive application to defendants in Texas state court, noting that "no such like authority exists within the State's statutes." *Pimentel v. Texas*, 710 S.W.2d 764, 1986 Tex. App. LEXIS 7695 (1986) (conviction reversed on other grounds).

This case presents the Court with the opportunity to clarify that its core analysis and principled holding in *Test* is applicable, under federal *constitutional* law, to persons in state court. Basis for such a ruling is provided by the Sixth, Ninth and Fourteenth Amendments, or, alternatively, under the First Amendment. *JSRC v. Carson*, 199 Or App 106 (2005) (set forth at App 16-29) (relying at App 20-23 on *Press-Enterprise I and II*; and citing at App 21 to *In re Disclosure of Juror Names and Addresses*, 592 NW2d 798 (Mich 1999); at App 23 to *SER Beacon Journal v. Bond*, 781 NE2d 180 (Ohio 2002); at

App 29 to *Pantos v. City and County of San Francisco*, 151 Cal. App 3d 258 (1984); and *Lewis v. State*, 632 A.2d 1175 (Md. 1993)). In *SER Beacon Journal Publ. Co.*, 781 NE2d 180, 187 (2002), the Ohio Supreme Court held that the public did have a First Amendment right to view the names and addresses of 290 prospective jurors, summoned to appear for voir dire in a murder case. The Supreme Court of Pennsylvania is currently considering closely related First Amendment claims, regarding public access to the names and addresses of empanelled jurors, see *Commonwealth v. Long*, 2005 Pa. Super. LEXIS 496, 871 A.2d 1262 (2004), *appeal granted in part* by 2005 Pa. LEXIS 2072 (2005) and 2005 Pa LEXIS 2073 (2005).

It is extremely important to note what this case does *not* deal with. It does not deal with the merits of an asserted jury challenge. It does not deal with a state court's refusal to unseal legitimately sealed court records. It does not deal with a request to use jury lists for commercial purposes, or the scope of a litigant's post-verdict remedy for pre-trial denial of access to the lists. Petitioners have not sought access to the *detailed* files such that a court might keep on individual prospective and seated jurors (see APP 64 n37), or to juror questionnaires containing sensitive personal information, or to Social Security or ODOT ID numbers, or full birthdates. Petitioners made (and make) no request to contact historic, current, or future jurors. Petitioners had agreed to subject themselves to the jurisdiction of the trial court and abide by any reasonable protective order issued over their use of the lists. Importantly, Petitioner Langley is not seeking a review of his conviction or death sentence from within this Petition: he is seeking only to vindicate his right of standing and opportunity to assert and vindicate his federal jury-related rights, and the rights of Marion County prospective jurors.

When Petitioners assert that *Test's* "unqualified right of access" to court jury lists is applicable to state courts, similarly required by the command of the federal constitution, under the First, Sixth, Ninth and/or Fourteenth Amendments, Petitioners understand that phrase to mean the following. (1) that they do not have to first uncover and aver a prima facie case of jury system error. (2) that the custodian of the state court jury lists can, nevertheless, (a) promulgate reasonable rules regarding how public access is to provided (such as requiring a person to bring themselves within the jurisdiction of the court), and (b) exercise supervision over the use and redisclosure of the jury lists.

Ensuring that the public has reasonable access to the jury lists does not mean that every review will only result in negative publicity, or a full-blown jury challenge. In the event that a basis for a federal challenge is found to exist, a number of factors will intersect affecting whether, and how best, to vindicate the federal right. Problems revealed by inspection that don't rise to the level of a federal challenge may be informally resolved, bettering the system. If inspection comes up "clean," court administrators can proudly communicate that result to the public and increase public confidence in courts.

IV. The Decision Below is Incorrect.

A. Under the "Experience and Logic" Test of the First Amendment, there is historical support for public inspection of state court jury lists, and public inspection of the lists plays a significant role in state jury selection.

As reflected in their Petition for Reconsideration (APP 73-98), Petitioners strongly disagreed with the state supreme court's determination of factors under the "experience and logic" test (Petition denied without further argument or briefing (App 14-15). There is great

historical support for public access to jury lists, and the public plays an extremely significant role in the official function of collecting and winnowing names for jury lists. The public passes laws specifying how jury selection is to be performed (App 59-62), and criminalizes deviations from those laws. The public pays the government to perform jury selection and summonsing, and pays government lawyers and judges to investigate, raise, rule on, and vindicate the jury-selection-related rights belonging to the public, prospective jurors and litigants. There is an undeniably long tradition of publicly funded studies (using both state and federal monies) of how jury selection is performed in state courts throughout our nation, and there exists an incredible reservoir of jury-system data in the public record, including data on Oregon's jury systems (App 93-97).

In addition to relying on *Press-Enterprise I and II*, and other cases, Petitioners distinguished *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978), where the Court upheld the prison's refusal to allow reporters certain types of access to prisoners and facilities under KQED's First Amendment claim, citing the special security needs integral to prison facilities, and the fact that the information sought was available from other sources. *Houchins* is easily distinguishable because (1) Defendants are no longer forcing state jurors to perform jury service inside its prisons, *State v. Cavan*, 337 Or. 433, 98 P.3d 381 (2004), and (2) Defendants have not produced one iota of evidence that a court's protective order is insufficient to safeguard their fears (imagined or real) of what might happen if Petitioners see the jury lists. Defendants' security concerns (App 45-46) were clearly an exaggerated response (App 47-48). Petitioners also argued over the import of *Los Angeles Police Department v. United Reporting Publishing Corporation*, 528 U.S. 32 (1991) (hereafter *LAPD v. URPC*) where the URPC sought access to county arrest records. Although the Court denied URPC's First Amendment claim, it remanded for further

hearings on URPC's non-frivolous Fourteenth Amendment, see later proceeding at *URPC v. California Highway Patrol*, 231 F. 3d 483 (2000). A similar situation exists in this case, as Defendants actually do allow *some* persons access to the legislatively sealed court jury lists, and have failed to offer one legitimate reason why Petitioners should not be allowed to inspect the lists.

What the case does reflect, is the clear desire of Defendants to keep *their* contribution to the jury lists confidential. But Defendants are all public employees, either elected or working under the supervision of an elected official (judges). Jury lists are the equivalent of a voter registration list, for "[j]ust as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *Blakely v. Washington*, 542 U.S. 296, 305-306 (2004). Defendants' efforts produce the list of persons who are presumptively eligible for paid state court jury duty, and eligible to exercise all of the power that comes with that job; eligible in some cases to vote whether a defendant will live or die *in the name of the entire public community*. Under *New York Times Co. v. Sullivan*, 376 U.S. 254, 270-286 (1964), any privacy rights Defendants indirectly assert as to their performance of their public duties in preparing the public's jury lists must be subordinated to the right of the public to monitor and speak about how the lists are compiled. As Oregon's State Attorney General opined in 1981:

> A public employee...[has little reason] to believe that how effectively he or she performs official duties will be kept confidential. There is also a clear public interest in knowing how public employees are performing their official duties.

41 Op Att'y Gen 437 (1981).

CONCLUSION

Unlike this Court's *Batson's* framework, Defendants' state scheme is *not* "designed to produce actual answers to suspicions and inferences that discrimination [or systematic error] may have infected the jury selection process," nor is it "designed to vindicate and encourage[] prompt rulings" on the merits of federal jury-related challenges. *Johnson v. California*, 162 L. Ed. 2d 129, 140-41. As reflected in the record, the 2001 statutory provision igniting this case was explicitly designed by state actors to *block* access to, and inspection of, the state's jury lists. Design aside, the state action in this case, including the ruling below, ensures that Oregon state court jury selection will be "largely immune" from federal constitutional scrutiny. *Batson*, 476 U.S. 79, 92-93. The state's "local practice" has thus put "unreasonable obstacles" in the way of Petitioners federal rights, in violation of the federal constitution, and the Court should quickly act to remove them. See *Davis v. Wechsler*, 263 U.S. 22, 24-25 (1923) (assertion of federal venue rights could not be defeated under state's local practice).

Petitioners ask the Court to grant their Petition and restore Petitioners' standing to vindicate their personal federal jury-related rights, as well as the rights of others, and to unburden their opportunity to do so. It is clear that a decision from this Court is needed to declare, uphold and protect Petitioners' federal rights. Expedited consideration and resolution of Petitioners' claims is merited, and will conserve federal and state judicial resources.

Respectfully submitted,

S. Rose Jade
Counsel for Petitioners

Dated: August 11, 2006

No.

IN THE SUPREME COURT OF THE UNITED STATES

JURY SERVICE RESOURCE CENTER.
DAVID SHANNON, AND
ROBERT PAUL LANGLEY, JR.,

Petitioners,

v.

STATE OF OREGON, ET AL

Respondents.

APPENDIX
to
PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OREGON

S. Rose Jade
P.O. Box 2104
1676 N. Coast Highway
Newport, Oregon 97365
(541) 961 8423

Counsel for Petitioners

Appendix

Table of Contents

OPINIONS BELOW

1. The opinion and judgment of the Oregon Supreme Court sought to be Reviewed, *Jury Service Resource Center v. DeMuniz*, 340 Or __, __ P3d __ (2006); 2006 Ore. LEXIS 350 dated April 27, 2006 ..... App 1-14

2. The order issued by the Oregon Supreme Court denying Plaintiffs' petition for reconsideration, dated May 23, 2006..... App 14-15

3. The Oregon Supreme Court's letter request for briefing on all federal constitutional provisions, dated September 27, 2005 ..... App 15-16, 67

4. The opinion and judgment of the Oregon Court of Appeals, dated April 13, 2005, *Jury Service Resource Center v. Carson*, 199 Or App 106, 110 P 3d 594 (2005) ..... App 16-29

5. Excerpts from the opinion and judgment of Judge Luukinen of the Marion County Circuit Court dismissing Plaintiffs' Complaint, dated Sept. 10, 2003 ..... App 29-30

OTHER ORDERS BELOW

6. Excerpts from the Final Judgment and Sentencing Order [death sentence] of Petitioner Langley, entered in the public record of the companion death penalty case of *State v. Langley (Gray III),* Marion Co. Cir. Ct. No. 88C21624, filed Feb. 03, 2006, entered Feb. 4, 2006, dated Feb. 3, 2006..... App 31-32

FEDERAL CONSTITUTIONAL AND STATUTORY AUTHORITIES

U.S. Const., amend. I 101
U.S. Const., amend. VI 101
U.S. Const., amend. IX 101
U.S. Const., amend. XIV 101

18 U.S.C. §243 101

OREGON STATUTES

Text from Oregon Revised Statutes and Court Rules pertaining to juries and access to jury records:

ORS 10.030 (Eligibility for jury service; discrimination prohibited) ..... App 60 n21
ORS 10.055 (Deferment of jury service) ..... App 59 n20
ORS 10.205 (Random selection of jurors) ..... App 59 n19
ORS 10.215 (Master jury list) .....App 59 n17-18, App 60 n22, 102
ORS 10.255 (Record of persons summoned to serve as jurors) ..... App 60 n22
ORS 10.265 (Preservation of jury orders, records and papers) ..... App 61 n22
ORS 10.275 102
ORS 136.001 (Right to jury trial) ..... App 61 n23
ORS136.005 (Challenges to jury panel)App 61 n23, App 62, 102-03

ORCP 57A (Challenging compliance with selection procedures) ..... App 32-33, 103-04

MISCELLANEOUS AUTHORITIES

Excerpts from the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Ed. 2003)

Guideline 10.7 (Investigation)..... App 33

Guideline 10.8 (The Duty to Assert Legal Claims) ..... App 34

Guideline 10.10.2 (Voir Dire and Jury Selection)..... App 34-35

Order of Judge Bergman, Allowing Disclosure of Confidential Jury Records, *Multnomah Co. Case No. 0102-31271, State v. Farmer, Nov. 26, 2001* ..... App 72-73 n32

PORTIONS OF THE TRIAL RECORD REFLECTING WHEN, WHERE, AND HOW THE FEDERAL QUESTIONS PRESENTED WERE RAISED, PRESERVED AND ACTED UPON

Excerpts from Petitioners' Original Complaint.... App 35-39
Excerpts from Plaintiffs' trial memoranda and exhibits
Petitioner Langley's Notice of Intent to Exhaust Civil Remedies ..... App 39-40
Excerpts from Defendants' briefing in the Court Of Appeals..... App 40-43
Excerpts from Plaintiffs' Reply brief filed in The Court of Appeals briefs..... App 43-45
Excerpts from Defendants' Petition for Review filed With the Supreme Court of Oregon ..... App 45-46
Notice of Similar Claims Raised by Another Death Penalty Defendant (State v. Krueger).. App 46
Excerpts from Plaintiffs' Response to Defendant's Petition for Review ..... App 46-48
Excerpts from Plaintiffs' Oregon Supreme Court Reply Brief..... App 48-58
Excerpts from Plaintiffs' Petition for Reconsideration of the Oregon Supreme Court's Opinion ..... App 58-98
Notice of Order Holding Mandamus Raising Similar Issues In Abeyance (*State v. Krueger* SC S53148) ..... App 99
Notice of Order Holding Mandamus Raising Similar Issues In Abeyance (*State v. Lueb* SC S53165) ..... App 100

The ruling below; the decision of the Supreme Court of Oregon, *Jury Service Resource Center v. De Muniz*, 340 Or. 423, __ P3d __ (2006).

FILED: April 27, 2006

IN THE SUPREME COURT OF THE STATE OF OREGON

JURY SERVICE RESOURCE CENTER;□DAVID SHANNON; and ROBERT PAUL LANGLEY, JR.,

Respondents on Review,

v.

PAUL J. DE MUNIZ;□KINGSLEY CLICK,□Office of the State Court Administrator,□Oregon Judicial Department;□PAUL LIPSCOMB;□JAMES MURCHISON,□Office of the Marion County Circuit Court Trial Court Administrator;□DALE KOCH;□DOUGLAS BRAY,□Office of the Multnomah County Circuit Court Trial Court Administrator;□ROBERT HUCKLEBERRY;□NANCY LAMVICK,□Office of the Lincoln County Trial Court Administrator;□BILL BRADBURY;□ROY TURNBAUGH;□and STATE OF OREGON,

Petitioners on Review.

(CC 03C-11907; CA A122978; SC S52571)

On review from the Court of Appeals.*

Argued and submitted January 10, 2006.

Erika L. Hadlock, Assistant Solicitor General, Salem,

argued the cause and filed the brief for petitioners on review. With her on the brief were Hardy Myers, Attorney General, and Mary H. Williams, Solicitor General.

Rose Jade, Newport, argued the cause and filed the brief for respondents on review.

Before Gillette, Presiding Justice, and Durham, Riggs, Balmer and Kistler, Justices.**

GILLETTE, J.

The decision of the Court of Appeals is reversed. The judgment of the circuit court is affirmed.

*Appeal from Marion County Circuit Court, Charles E. Luukinen, Judge. 199 Or App 106, 110 P3d 594 (2005).

**De Muniz, C.J., and Carson, J., did not participate in the consideration or decision of this case.

GILLETTE, J.

This matter requires us to determine the extent to which the data compiled and used by various public entities and officers in the process of selecting trial juries may be obtained by a member of the public. Plaintiffs, as members of the public, [1] initially sought to gain access to that information (hereinafter collectively referred to as "jury pool records") by requesting it from the Oregon Judicial Department, which uses the data to compile the lists from which trial juries are chosen. When their requests were unsuccessful, plaintiffs filed the present case in circuit court. The circuit court granted summary judgment to defendants and dismissed the complaint. The Court of Appeals reversed. *Jury Service Resource Center v. Carson*, 199 Or App 106, 110 P3d 594 (2005). We allowed

defendants' petition for review and now reverse the decision of the Court of Appeals and affirm the judgment of the circuit court.

The Court of Appeals set out the facts as follows:

> "Plaintiffs are Jury Services Resource Center (JSRC), a nonprofit organization interested in auditing the Lincoln County Circuit Court's jury pool selection process; Shannon, a citizen interested in scholarly research into the state's jury pool selection process and a potential juror in Multnomah County; and Langley, a man who has been convicted of aggravated murder and was awaiting a retrial of the penalty phase in that case in Marion County. Defendants are the State of Oregon and various state officials in the judicial and executive branches.
>
> "The dispute in this case centers on jury pool records consisting of 'source lists,' 'master lists,' and 'term lists.' 'Source lists' are lists provided to the State Court Administrator by county election officials and by Department of Transportation officials, as well as 'any other sources approved by the Chief Justice of the Supreme Court that will furnish a fair cross section of the citizens of the county.' ORS 10.215(1). 'Master lists' are 'names selected at random from the source lists' at the direction of the State Court Administrator. *Id.* The master lists contain not only the names of prospective jurors but also their addresses. ORS 10.215(4). 'Term lists' or 'term jury lists' are names and addresses 'selected at random from the master jury list * * * at the direction of the presiding judge for the judicial district or clerk of court' using a method prescribed by the presiding judge of each judicial district. ORS 10.205(2); ORS 10.225(1). Because term lists are chosen before a term begins, the composition of any term list is

> always complete before the beginning of a trial at which a jury chosen from the term list might sit. ORS 10.225(1).
>
> "JSRC and Langley requested that court officials from, respectively, Lincoln County and Marion County disclose to them the contents of source lists, master lists, and term lists[, asserting, *inter alia*, that the lists were public records.] When the county judicial officials denied plaintiffs' requests, [plaintiffs] appealed to the Attorney General. *See* ORS 192.450 (Attorney General reviews denial of public record requests). He, too, denied the petitions, explaining that the requested records were exempt from disclosure under the [Public Records Law]. JSRC and Langley then consolidated their various claims and sought judicial review under ORS 192.490 in Marion County Circuit Court. Shannon, who had never filed a request for any documents, was joined as a plaintiff; his claim was for declaratory judgment under ORS 28.010. Instead of responding to plaintiffs' complaint with an answer, defendants moved for summary judgment. *See* ORCP 47 B (party against whom a claim is brought may move for summary judgment 'at any time'). Concluding that defendant's denials did not violate the [Public Records Law] or any constitutional provisions raised by plaintiffs, the trial court granted defendants' motion for summary judgment, rejected a subsequent 'motion for reconsideration,' and entered judgment for defendants."

Jury Service, 199 Or App at 109-110 (footnote omitted). As noted, plaintiffs appealed the adverse judgment to the Court of Appeals.

In its opinion, the Court of Appeals rejected plaintiffs' statutory arguments under the Oregon Public Records

Law, ORS 192.410 to ORS 192.505, and their arguments under the Oregon Constitution, including article I, section 8 (free speech), section 10 (open courts), and section 20 (equal privileges and immunities). *Jury Service*, 199 Or App at 112-16. However, the Court of Appeals agreed with plaintiffs' argument that they were entitled to access to jury pool records under the First Amendment to the United States Constitution.[2] Using a test of "experience and logic" that the United States Supreme Court has announced as the standard in disputes involving the openness of judicial proceedings, the Court of Appeals concluded that all stages of the jury selection process presumptively are open, including the collection of names for preliminary lists such as the jury pool records in this matter. *Jury Service*, 199 Or App at 120-23.

Based on a brief historical survey, the Court of Appeals concluded that jury selection traditionally has been an open process. The court noted that, at common law, the sheriff wrote names of qualified landowners on a sheet of paper and summoned the listed men to appear at trial. That process, the court declared, was "conducted in public." *Id.* at 121. The court also recited some evidence suggesting that, in the past, jury lists were available to the public in Oregon. *Id.* at 121-22. In terms of whether public access plays a significant role in the process at hand, the Court of Appeals dismissed the idea that the process by which jury lists are created could be separated analytically from the trial itself. The issue, the Court of Appeals stressed, involved both fairness in fact in the jury selection process and also the appearance of fairness. *Id.* at 122.

Based on that reasoning, the Court of Appeals concluded that the jury pool records should be presumed to be public and, the court went on to state, "[u]nder a system such as Oregon's, in which the particular jury ultimately empaneled in any given trial is drawn randomly from a pool that is itself selected before a jury term, adequate

protection of the public's right (as well as the defendant's and potential jurors' rights) must begin at the source of the process itself, at the aptly named 'source lists.'" *Id.* at 122-23. The Court of Appeals further opined, "Opening *voir dire* does not alone suffice to guarantee that a jury is untainted, because taint at the source could flow forward at each subsequent step. Thus, to protect the values guaranteed by the First Amendment right of access to the jury selection process, that process must be open from the first step." *Id.* at 123. Notwithstanding that conclusion, however, the court left the door open for defendants to deny plaintiffs access to the records that they seek, at least in cases in which there is a showing that denying public access serves a higher interest and the restriction, if any, is narrow in scope. *Id.* We allowed defendants' petition for review.

We begin our own analysis by stating that, plaintiffs' arguments to the contrary notwithstanding, the Court of Appeals did not err in rejecting plaintiffs' arguments respecting the Public Records Law and Article I, sections 8, 10, and 20 of the Oregon Constitution. We agree with the fundamentals of the analysis that that court employed in rejecting those claims, and see no purpose to be served by paraphrasing the analysis here. We therefore confine our discussion to the proposition that the Court of Appeals accepted, namely, plaintiffs' contention that the First Amendment to the United States Constitution requires defendants to give plaintiffs full access to jury pool records, including source lists, master lists, and jury term lists.

In a line of cases issued over the past quarter century, the United States Supreme Court has established that the First Amendment encompasses a public right to observe the workings of at least some parts of the administration of justice, particularly criminal trials. Consequently, trials must be conducted openly with full access to the public. "The right of access to places traditionally open to the

public, as criminal trials have long been, may be seen as assured by the amalgam of the First Amendment guarantees of speech and press; and their affinity to the right of assembly is not without relevance." *Richmond Newspapers, Inc. v. Virginia*, 448 US 555, 577, 100 S Ct 2814, 65 L Ed 2d 973 (1980) (plurality opinion). The First Amendment ensures access to criminal trials because of a "common understanding that 'a major purpose of that Amendment was to protect the free discussion of governmental affairs.'" *Globe Newspaper Co. v. Superior Court*, 457 US 596, 604, 102 S Ct 2613, 73 L Ed 2d 248 (1982), quoting *Mills v. Alabama*, 384 US 214, 218, 86 S Ct 1434, 16 L Ed 2d 484 (1966). "Thus to the extent that the First Amendment embraces a right of access to criminal trials, it is to ensure that this constitutionally protected 'discussion of governmental affairs' is an informed one." *Id.* at 604-05. The administration of justice, and criminal trial proceedings in particular, the Supreme Court has emphasized, entail a significant governmental function that must remain open to public scrutiny:

> "[T]he right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole. Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole. Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process -- an essential component in our structure of self-government. In sum, the institutional value of the open criminal trial is recognized in both logic and experience."

Id. at 606 (footnotes omitted).

Subsequent cases, such as *Press-Enterprise Co. v. Superior Court*, 464 US 501, 104 S Ct 819, 78 L Ed 2d 629 (1984) (*Press-Enterprise I*) and *Press-Enterprise Co. v. Superior Court*, 478 US 1, 106 S Ct 2735, 92 L Ed 2d 1 (1986) (*Press-Enterprise II*), have clarified the scope and applicability of the aforesaid principles. Like their predecessors, those cases involved efforts by the news media, who claimed to represent the public, to gain access to certain parts of trial court proceedings. In *Press-Enterprise I*, a California state trial court closed the *voir dire* questioning of individual potential jurors to the public during a murder trial. Balancing the interest in governmental transparency against the privacy of individual jurors' discussions of sensitive personal experiences, the trial court later ruled that the transcripts of *voir dire* also would not be released to the public. The case eventually made its way to the United States Supreme Court, which vacated the trial court's rulings. The Court stated: "The process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system." 464 US at 505. According to the Court, "historical evidence * * * reveals that, since the development of trial by jury, the process of selection of jurors has presumptively been a public process with exceptions only for good cause shown." *Id.* In particular, the court expressed its concern that the trial court had opened only three days of a six-week *voir dire* process to the public and had refused to release the transcript of the closed parts of the proceeding, even though most of the information elicited during *voir dire* was not sensitive in nature. *Id.* at 513.

In *Press-Enterprise II*, a California state court excluded the public from a preliminary hearing in a murder case. Under then-existing California law, preliminary hearings were generally open to the public, but the magistrate could exclude the public if exclusion were necessary to

protect the defendant's right to a fair and impartial trial. In *Press-Enterprise II*, the magistrate had granted the defendant's motion (which the state had not opposed) to exclude the public, including the news media. On the appeal of the excluded media, the United States Supreme Court again reversed. The Court observed that its cases under the First Amendment right of access to criminal proceedings had emphasized the history of open criminal trials and the positive role of that openness. 478 US at 8-9. Referring back to its discussion in earlier cases summarizing the history of openness in criminal trials and jury selection, and its salutary effect on both basic fairness and the appearance of fairness of the criminal trial, the Court stated:

> "These considerations of experience and logic are, of course, related, for history and experience shape the functioning of governmental processes. If the particular proceeding in question passes these tests of experience and logic, a qualified First Amendment right of public access attaches. But even when a right of access attaches, it is not absolute. * * * While open criminal proceedings give assurances of fairness to both the public and the accused, there are some limited circumstances in which the right of the accused to a fair trial might be undermined by publicity."

Press-Enterprise II, 478 US at 9 (citation omitted). Historically, the Court observed, preliminary hearings generally have been held in open court where the public may attend. *Id.* at 10. In addition, the Court concluded that public access to preliminary hearings "plays a particularly significant positive role in the actual functioning of the process." *Id.* at 11-12. The Court noted that *Richmond Newspapers*, *Globe Newspaper*, and *Press-Enterprise I* established that public access to criminal trials and to jury selection at those trials "is essential to the proper functioning of the criminal justice system," and

that "California preliminary hearings are sufficiently like a trial to justify the same conclusion." *Id.* at 12. It followed that the California court had erred in closing the preliminary hearing to the public. *Id.* at 15. Read together, *Richmond Newspapers*, *Globe Newspaper*, *Press-Enterprise I*, and *Press-Enterprise II* establish that certain forms of judicial proceedings may be characterized as "presumptively open," based on history and function. The historical record indicates whether the process has been one that was open to the press and general public, and the particular function of the process within the broader criminal trial context determines whether public access plays a significant positive role. *Press-Enterprise II*, 478 US at 8-9. If the test of experience and logic is satisfied, then the particular process is presumptively open. Nevertheless, a party successfully may overcome that presumption of openness by demonstrating an overriding interest, *i.e.*, by a showing that closure is essential to preserve "higher values" and is "narrowly tailored to serve that interest." *Id.* at 9-10, 13-14.

With the foregoing guidelines in mind, we turn to a determination whether the principles to be derived from the *Press Enterprise* cases and their predecessors dictate the conclusion that the Court of Appeals reached in this case.

They do not. Although historical evidence supports the idea that trials, including the process of selecting particular jurors at the threshold of trial, were open to the public, *Press-Enterprise I*, 464 US at 505-10, the process of selecting potential jurors has never been open in that way. At English common law, the task of preliminarily selecting jurors was delegated to the discretion of a trusted public official, namely, the sheriff. *See* Sir Matthew Hale, *The History of the Common Law of England* 337 (6th ed 1820) (describing role of sheriff). Under that system, the sheriff enjoyed enormous discretion in deciding how to select trial jurors. *See*

William L. Murfree, *A Treatise On the Law of Sheriffs and Ministerial Officers* 177 (2d ed 1890) ("There seems to have been no limitation on [the sheriff's] choice.").

In the United States, however, legislatures in the nineteenth century created statutory procedural standards for identifying potential jurors that were less discretionary. Generally speaking,

> "[t]he statutes usually specif[ied] the number [of jurors] to be annually selected in each county, which selection is made by town authorities, county courts, county commissioners, or other officers, and the list so prepared is transmitted to the clerk of the county or circuit court, where it is filed, and the names copied upon slips of paper which are placed in the jury box ready for the drawing."

Seymour D. Thompson & Edwin G. Merriam, *A Treatise on the Organization, Custody and Conduct of Juries, Including Grand Juries* 41 (1882). Even if we were to assume from the foregoing that the American experience could be characterized as more "open," in the sense that certain statutes restricted discretion, we know of no authority that permitted members of the public to scrutinize any preliminary or tentative lists that may have led to the final one. Certainly, there is no historical support for the kind of openness that plaintiffs demand.

The next question under the United States Supreme Court's cases is whether public access to jury lists "plays a particularly significant positive role in the actual functioning of the process." *Press-Enterprise II*, 478 US at 11. As noted, the United States Supreme Court has emphasized the function of openness in criminal trials, in which the public may observe the process. "The value of openness lies in the fact that people not actually attending trials can have confidence that standards of

fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known." *Press-Enterprise I*, 464 US at 508 (emphasis in original). That is, criminal trials should be conducted openly, with an audience, so that the public may verify that the government is acting fairly in prosecuting defendants. But does that unremarkable proposition respecting the trial process itself translate into a requirement of transparency throughout the multi-step, pretrial process that produces a panel of venire to serve at the trial?

We think not. We note especially that, in concluding that public participation plays a role in the governmental function of selecting names for jury lists, and that a qualified right to jury records therefore falls within the protections of the First Amendment, the Court of Appeals proceeded from several dubious premises. First, it asserted that, "although access to jury lists is not the same as access to *voir dire*, the differences are not significant." *Jury Service*, 199 Or App at 120. Second, it opined that the timing of the process of compiling jury lists is of no importance, even though, "[w]hen that process [of compiling juror information] takes place, the term during which the selected jurors will sit has not begun." *Id.* at 122. Third, the Court of Appeals concluded that, because the jury selection process at trial is open to the public, "that process must be open from the first step." *Id.* at 123.

The best way that we can summarize our criticism of the foregoing is to say that the Court of Appeals mistook access to a public trial for access to government information. The United States Supreme Court's emphasis in the *Press-Enterprise* cases was on access of the public *to the trial itself*, not on the process that lead to the selection of the actors in that event. Those cases establish that the public has a right to attend criminal

trials. The selection of names for the list of prospective jurors, however, is one or more (sometimes several) steps removed from the trial itself. Unlike the *Press-Enterprise* cases, plaintiffs here do not assert a right to view a process, such as a trial, but instead demand to see a work product that government employees have created pursuant to statutory directives. *See* ORS 10.215 (describing creation of master list); ORS 10.225 (describing creation of term jury lists). Unlike actual trials, public access plays no significant role in the official and largely rote function of collecting and winnowing names for jury lists.

In fact, as plaintiffs themselves have framed it, this dispute actually is about plaintiffs' asserted right to examine the work product of governmental officials, after those officials have combed through official records and made selections from lists of names to determine which citizens might be called for jury duty and which ones will not. So understood, the dispute is far more analogous to cases in which the United States Supreme Court has ruled that the general public does not have a First Amendment right of access to places, information, and documents within the government's control than it is to the *Press-Enterprise* cases. *See, e.g.*, *Los Angeles Police Department v. United Reporting Publishing Corp.*, 528 US 32, 120 S Ct 483, 145 L Ed 2d 451 (1999) (First Amendment does not require police department to release arrestees' addresses to general public); *Houchins v. KQED, Inc.*, 438 US 1, 89 S Ct 2588, 57 L Ed 2d 553 (1978) (First Amendment does not give journalists right to photograph jail facilities). In our view, the *Press-Enterprise* cases do not support plaintiffs' theory, and we know of no other source of law that will better serve them.

We conclude that there is no right of access under the First Amendment to jury pool records of the kind sought here. As previously noted, we have considered the parties' other arguments not premised on the First Amendment

and agree with the Court of Appeals that those arguments are not well taken. It follows that the trial court's grant of summary judgment to defendants was correct. The Court of Appeals erred in ruling to the contrary.

The decision of the Court of Appeals is reversed. The judgment of the circuit court is affirmed.

1. Plaintiff Langley presently is the defendant in a pending aggravated murder case, but he does not rely on that status in this proceeding.

2. The First Amendment to the United States Constitution provides, in part: "Congress shall make no law * * * abridging the freedom of speech, or of the press * * *."

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The denial by the Oregon Supreme Court of Plaintiff's Petition for Reconsideration, dated May 23, 2006

IN THE SUPREME COURT OF THE STATE OF OREGON

JURY SERVICE RESOURCE CENTER;□DAVID SHANNON; and ROBERT PAUL LANGLEY, JR.,
Plaintiffs-Appellants
Respondents on Review,

v.

PAUL J. DE MUNIZ;□KINGSLEY CLICK,□Office of the State Court Administrator,□Oregon Judicial Department;□PAUL LIPSCOMB;□JAMES MURCHISON,□Office of the Marion County Circuit Court Trial Court Administrator;□DALE KOCH;□DOUGLAS BRAY,□Office of the Multnomah

County Circuit Court Trial Court Administrator;□ROBERT HUCKLEBERRY;□NANCY LAMVICK,□Office of the Lincoln County Trial Court Administrator;□BILL BRADBURY;□ROY TURNBAUGH;□and STATE OF OREGON,
Defendants-Respondents,
Petitioners on Review.

Marion County Circuit Court No. 03C-11907
SC S52571
CA A122978

ORDER DENYING PETITION FOR RECONSIDERATION

Upon consideration by the court.
The court has considered the petition for reconsideration and orders that it be denied.
Dated this 23rd day of May 2006.

De Muniz, C.J., and Carson, J., not participating

/signed Robert D. Durham, Presiding Justice/

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Letter from the Supreme Court of Oregon to counsel requesting briefing on all federal issues, dated September 27, 2005

"Dear Ms. Hadlock and Ms. Jade:

The Court has granted review in this proceeding. ORAP 9.20(2) provides that the Court "may consider other issues that were before the Court of Appeals." Pursuant to that authorization, the Court intends to consider on review whether defendants violated any pertinent state statute, including Oregon's Public Records Law, and any provision of the state or federal constitution, in addition to the First

Amendment to the United States Constitution, in refusing to disclose source, master, and term lists of jurors.

To assist in that endeavor, the Court requests, pursuant to ORAP 9.20(3), that the parties address those issues in their briefs on the merits.

Sincerely,

/signed John Koskela, Records Section/ Supreme Court of Oregon, letter dated September 27, 2005/[1]

The Decision of the Court of Appeals of Oregon,
Jury Service Resource Center v. Carson, 199 Or. App. 106, 110 P. 3d 594 (2005)

FILED: April 13, 2005

IN THE COURT OF APPEALS OF THE STATE OF OREGON

JURY SERVICE RESOURCE CENTER, DAVID SHANNON, and ROBERT PAUL LANGLEY, JR.,

Appellants,

v.

WALLACE CARSON, JR.; KINGLSEY CLICK, Office of the State Court Administrator, Oregon Judicial Department; PAUL LIPSCOMB; JAMES MURCHISON, Office of the Marion County Circuit Court Trial Court Administrator; DALE KOCH; DOUGLAS BRAY, Office of the Multnomah County

[1] A copy of the letter was included as Attachment page 8 to Plaintiffs' Petition for Reconsideration filed with the Oregon Supreme Court on May 6, 2006

Circuit Court Trial Court Administrator;□ROBERT HUCKLEBERRY; NANCY LAMVICK,□Office of the Lincoln County Trial Court Administrator;□BILL BRADBURY; ROY TURNBAUGH;□and STATE OF OREGON,

Respondents.

03C-11907; A122978

Appeal from Circuit Court, Marion County.

Charles E. Luukinen, Judge.

Argued and submitted November 23, 2004.

Rose Jade argued the cause for appellants. With her on the brief was Karen A. Steele.

Erika L. Hadlock, Assistant Attorney General, argued the cause and filed the brief for respondents. With her on the brief were Hardy Myers, Attorney General, and Mary H. Williams, Solicitor General.

Before Edmonds, Presiding Judge, and Wollheim and Schuman, Judges.

SCHUMAN, J.

Reversed and remanded.

SCHUMAN, J.

The issue in this case is whether defendants' refusal to disclose certain jury pool records to plaintiffs violates either the Oregon Public Records Law (PRL), ORS 192.410 - 192.505, or some provision of the state or federal constitutions. The trial court granted defendants' motion for summary judgment. Because we conclude that defendants are not entitled to judgment as a matter of law, we reverse and remand.

The relevant facts are either procedural or relate to the identity of the parties, and they are not in dispute. Plaintiffs are Jury Services Resource Center (JSRC), a nonprofit organization interested in auditing the Lincoln County Circuit Court's jury pool selection process; Shannon, a citizen interested in scholarly research into the state's jury pool selection process and a potential juror in Multnomah County; and Langley, a man who has been convicted of aggravated murder and was awaiting a retrial of the penalty phase in that case in Marion County. Defendants are the State of Oregon and various state officials in the judicial and executive branches.

The dispute in this case centers on jury pool records consisting of "source lists," "master lists," and "term lists." "Source lists" are lists provided to the State Court Administrator by county election officials and by Department of Transportation officials, as well as "any other sources approved by the Chief Justice of the Supreme Court that will furnish a fair cross section of the citizens of the county." ORS 10.215(1). "Master lists" are "names selected at random from the source lists" at the direction of the State Court Administrator. *Id.* The master lists contain not only the names of prospective jurors but also their addresses. ORS 10.215(4). "Term lists" or "term jury lists" are names and addresses "selected at random from the master jury list * * * at the direction of the presiding judge for the judicial district or clerk of court" using a method prescribed by the presiding judge of each judicial district. ORS 10.205(2); ORS 10.225(1). Because term lists are chosen before a term begins, the composition of any term list is always complete before the beginning of a trial at which a jury chosen from the term list might sit. ORS 10.225(1).

JSRC and Langley requested that court officials from, respectively, Lincoln County and Marion County disclose to them the contents of source lists, master lists, and term lists. When the county judicial officials denied plaintiffs'

requests, they appealed to the Attorney General. *See* ORS 192.450 (Attorney General reviews denial of public record requests). He, too, denied the petitions, explaining that the requested records were exempt from disclosure under the PRL. JSRC and Langley then consolidated their various claims and sought judicial review under ORS 192.490 in Marion County Circuit Court. Shannon, who had never filed a request for any documents, was joined as a plaintiff; his claim was for declaratory judgment under ORS 28.010.[1] Instead of responding to plaintiffs' complaint with an answer, defendants moved for summary judgment. *See* ORCP 47 B (party against whom a claim is brought may move for summary judgment "at any time"). Concluding that defendant's denials did not violate the PRL or any constitutional provisions raised by plaintiffs, the trial court granted defendants' motion for summary judgment, rejected a subsequent "motion for reconsideration," and entered judgment for defendants. This appeal ensued.

Although plaintiffs' appeal contains eight assignments of error and conflates the various parties and their claims and defenses, it clearly and accurately states the issues before us: Does the PRL permit defendants to deny plaintiffs access to the requested documents? If so, do plaintiffs nonetheless have a right of access to the documents under the state or federal constitution?

Of course, if some constitutional provision confers on plaintiffs a constitutional right of access to the information, the fact that a statute permits denial of access is irrelevant; the statute would be unconstitutional. Plaintiffs cite several state and federal constitutional provisions as sources of the asserted right of access to jury lists[.]***Our conclusion that defendants have not violated any of plaintiffs' rights under the Oregon Constitution does not end the constitutional inquiry. Plaintiffs may have more or greater rights under the federal constitution, and, if they do, the state is powerless

to infringe on them even if it could do so without violating its own constitution. We therefore turn to plaintiffs' claim under the First Amendment to the United States Constitution: the claim that, as members of the public, they have a right of access to documents relevant to the jury selection process.

That claim finds support in *Press-Enterprise Co. v. Superior Court*, 464 US 501, 104 S Ct 819, 78 L Ed 2d 629 (1984) (*Press-Enterprise I*). In that case, the plaintiff contended that it had a right to attend the *voir dire* proceedings in a capital murder trial and that the right was separate and distinct from the accused's right to a public trial in the underlying case. The trial court denied access and the California Supreme Court denied review. *Id.* at 504-05. The United States Supreme Court granted certiorari and reversed. Reviewing the history of criminal trials, the Court concluded that, "beginning in the sixteenth century, jurors were selected in public" and that "[t]he presumptive openness of the jury selection process in England, not surprisingly, carried over into proceedings in colonial America." *Id.* at 507-08. The Court described the continuing value of openness:

> "The open trial thus plays as important a role in the administration of justice today as it did for centuries before our separation from England. The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system."

Id. at 508 (emphasis in original). Thus, the Court

concluded, the jury selection process is presumptively open, and the presumption can be overcome only if those urging closure can show "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* at 510. The Court found that, although juror privacy could, in some instances, be such an interest--for example, where the juror had to answer personal questions as part of the *voir dire* screening--there was nonetheless no justification for denying access to the entire process. *Id.* at 511-13. Although three justices wrote concurring opinions, none dissented, and all agreed that the right of access to criminal trials belonged not to the defendant but to the public.

The Court returned to the subject of access to trials and elaborated on it in *Press-Enterprise Co. v. Superior Court*, 478 US 1, 106 S Ct 2735, 92 L Ed 2d 1 (1986) (*Press-Enterprise II*). The issue, as described by the Court, was "whether [the plaintiff] has a First Amendment right of access to the transcript of a preliminary hearing growing out of a criminal prosecution." *Id.* at 3. After a 41-day hearing preceding a capital murder trial, the plaintiff sought release of the transcript. The presiding magistrate refused and the California Supreme Court agreed, holding that the First Amendment right described in *Press-Enterprise I* applied only to trials themselves and not to pretrial proceedings. Again, the United States Supreme Court granted certiorari and reversed. *Id.* at 6.

The Court reemphasized that the right at issue emanated from the First Amendment, not the Sixth, and that it belonged to the public. *Id.* at 7-8. The Court also emphasized that the applicability of the right did not depend on the label given to the event to which the plaintiff sought access. *Id.* Rather, the Court articulated what has come to be known as the "experience/logic" test. *In re Disclosure of Juror Names and Addresses*, 233 Mich App 604, 610, 592 NW2d 798, 801 (1999). To determine

whether a particular aspect of a criminal proceeding is presumptively open, the Court will look first to history to determine "whether the place and process have historically been open to the press and general public." *Press-Enterprise II*, 478 US at 8. It will then determine "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.* (citing *Globe Newspaper Co. v. Superior Court*, 457 US 596, 606, 102 S Ct 2613, 73 L Ed 2d 248 (1982)). If the process meets the test of history and logic, then it is presumptively open, and "'[t]he presumption may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" *Press-Enterprise II*, 478 US at 9 (quoting *Press-Enterprise I*, 464 US at 510). Applying the foregoing criteria, the Court concluded that the preliminary hearing was presumptively open, that the interest in avoiding pretrial publicity was not sufficiently compelling, and that, in any event, closing the entire 41 days of the hearing was not a narrowly tailored prophylactic measure. *Press-Enterprise II*, 478 US at 13-15.

The two *Press-Enterprise* cases, then, establish a test for closure that

> "is extremely hard to meet. In fact, since [1979], the Court has found a qualified First Amendment right of access to practically every aspect of the judicial process * * *. Lower courts have followed the Supreme Court's lead, and have expanded the areas of access, with [the Second Circuit], for example, finding a qualified access right extending not only to pretrial hearings, but also to the Criminal Justice Act compensation forms filed by appointed counsel for indigent defendants. The Second Circuit has also found a qualified access right extending to written documents filed in connection with pretrial suppression motions and other motions, even when

they include wiretap material[.]"

Kimba M. Wood, *Reexamining the Access Doctrine*, 69 S Cal L Rev 1105, 1107-08 (1996) (citations omitted). The Ninth Circuit has also expanded on the Supreme Court's case law, applying the principles from the *Press-Enterprise* cases to establish rights of access to pretrial proceedings. *Seattle Times Co. v. U.S. Dist. Court for Western Dist. of Washington*, 845 F2d 1513, 1517 (9th Cir 1988) (bail eligibility proceeding). *But see Times Mirror Co. v. U.S.*, 873 F2d 1210, 1220 (9th Cir 1989) (no public access to search warrant affidavits during investigation and before indictment).

Although "the majority of courts that have addressed [the] issue have recognized a right of access to juror names and addresses," *State ex rel Beacon Journal v. Bond*, 98 Ohio St 3d 146, 156, 781 NE2d 180, 192 (2002), the cases typically deal with that information in the context of *voir dire* and not general jury lists. However, we believe that, although access to jury lists is not the same as access to *voir dire*, the differences are not significant.

The Supreme Court's conclusion that the *voir dire* process is presumptively open to the public states the operative principle more generally: it announces that "*jurors were selected* in public" and that "[t]he presumptive openness of *the jury selection process* in England, not surprisingly, carried over into proceedings in colonial America." *Press-Enterprise I*, 464 US at 507-08 (emphasis added). The reason for using general terms is that, at the historical moment under discussion, jurors were selected directly from the among the qualified members of the public.

The introduction of a multi-step process complicates our inquiry for two reasons. First, it requires us to determine whether a modern elaboration of a traditional practice is itself traditional. Second, it requires us to determine

whether the rationale that supports public access to the part of the jury selection process that occurs in conjunction with an identifiable trial also applies to those parts of the process that occur before any particular dispute has entered the judicial system. We conclude that the answers to these inquiries point in the direction of requiring access to jury lists in criminal trials.

In other contexts, Oregon courts have held that, when a historical fact or circumstance evolves over time, constitutional principles applicable to the historical fact or circumstance apply with equal force to the evolved fact or circumstance. Thus, in *State v. Robertson*, 293 Or 402, 412, 649 P2d 569 (1982), the Supreme Court's list of examples of "historical exceptions" to free speech principles includes "perjury, solicitation or verbal assistance in crime, some forms of theft, forgery and fraud *and their contemporary variants*." (Emphasis added.); *see also In re Lasswell*, 296 Or 121, 124, 673 P2d 855 (1983) (exception applies to speech prohibition that "falls within an *original or modern version* of a historically established exception" (emphasis added)). In discussing the right to bear arms under Article I, section 27, the court held, "The appropriate inquiry in the case at bar is whether a kind of weapon, *as modified by its modern design and function*, is of the sort commonly used by individuals for personal defense during either the revolutionary and post-revolutionary era, or in 1859 when Oregon's constitution was adopted." *State v. Delgado*, 298 Or 395, 400-01, 692 P2d 610 (1984) (emphasis added). The "classes of citizens" protected by the antidiscrimination principles that the framers adopted in Article I, section 20, include not only the groups that the framers would have included, but their modern counterparts as well. *Cox v. State of Oregon*, 191 Or App 1, 7, 80 P3d 514 (2003) (Schuman, J., concurring).

Further, to the extent the historical record provides useful information, it indicates an open process. According to Sir

Matthew Hale, *The History of the Common Law of England* 337-39 (Charles Runnington ed 1820), a writ would issue to the county sheriff, who would summon 24 qualified property-owning men from the local neighborhood and write their names on a small sheet of parchment called a "panel." The empaneled men would then "be brought, or summoned * * * for their appearance at the trial; whereby the parties may have notice of the jurors, and of their sufficiency and indifferency, that so they may make their challenges upon the appearance of the jurors, if there be just cause." *Id.* at 340. After challenges, 12 members would be selected. Thus, the entire process was conducted in public. *See also* William Blackstone, *Commentaries on the Laws of England* 518-23 (Wm. H. Browne ed 1892).

In Oregon, before the enactment of ORS 10.215 in 1985, no provision of law kept jury lists from public disclosure and, although the evidence is not extensive, there is reason to believe that the accepted practice in at least some courts was to make them available for inspection. In *Bramwell v. Rowland*, 123 Or 33, 36, 261 P 57 (1927), for example, the court examined a motion for a change of venue based on the assertion that "the inhabitants of Lincoln [C]ounty, where this action was commenced, were so prejudiced against the defendant that he could not expect an impartial trial in that county." The court recited that an interested party "had examined the jury list, and found that only a very small percentage of the jurors were" potentially biased. *Id.* at 39. Further, in hearings on House Bill (HB) 2545 (1985), which ultimately became ORS 10.215, at least one lawyer-legislator asserted that it was his practice to examine jury lists before trial. Tape Recording, House Judiciary Committee, Subcommittee 2, HB 2545, Apr 12, 1985, Tape 435, Side A (colloquy among R. William Linden, State Court Administrator; Rep Mike Kopetski; and Rep Stan Bunn). In sum, we see no reason why the historical respect paid to new aspects of jury selection such as the assembly of jury lists should differ

from the respect paid to the original ones such as *voir dire*.

The timing of jury list creation presents a different question. Although *Press-Enterprise II* and lower court decisions hold that the right of access applies not only to the trial itself but also to preliminary hearings and other proceedings that occur before an actual jury is empaneled, that fact does not address the question whether the right also applies to procedures that are as remote from actual trials as the assembly of jury lists. When that process takes place, the term during which the selected jurors will sit has not begun. ORS 10.225(1). However, we believe that fact to be irrelevant. The United States Supreme Court has noted the importance of a jury selection system that ensures not only fairness itself but the public appearance of fairness. "[P]ublic proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct by jurors fairly and *openly* selected." *Press-Enterprise I*, 464 US at 509 (emphasis added). Both federal and state law recognize the fundamental value of juries that represent a fair cross-section of the population. *Lockhart v. McCree*, 476 US 162, 184, 106 S Ct 1758, 90 L Ed 2d 137 (1986) ("[T]he Constitution presupposes that a jury selected from a fair cross section of the community is impartial[.]"); 28 USC § 1861 ("It is the policy of the United States that all litigants in federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes."); ORS 10.215(1) (requiring source list that "will furnish a fair cross section of the citizens of the county").

Under a system such as Oregon's, in which the particular jury ultimately empaneled in any given trial is drawn randomly from a pool that is itself selected before a jury term, adequate protection of the public's right (as well as the defendant's and potential jurors' rights) must begin at

the source of the process itself, at the aptly named "source lists." ORS 10.215. Opening *voir dire* does not alone suffice to guarantee that a jury is untainted, because taint at the source could flow forward at each subsequent step. Thus, to protect the values guaranteed by the First Amendment right of access to the jury selection process, that process must be open from the first step. We therefore conclude that the source lists, master lists, and jury term lists used in criminal trials are presumptively open to the public. Because Oregon does not use different lists for criminal and civil juries, all the lists are presumptively open. (5)

That conclusion, however, does not mean that defendants must now provide plaintiffs the relief that they seek. Defendants may overcome the presumption in favor of openness by establishing that closure serves an overriding interest and that it will be carried out by narrowly tailored means. *See Press-Enterprise II*, 478 US at 13-14. That determination occurs on a case-by-case basis and must be accompanied by "specific, on the record findings." *Id.* at 13. Further, the party seeking nondisclosure has the burden of presenting facts supporting it. *Oregonian Pub. Co. v. U. S. Dist. Court for Dist. of Oregon*, 920 F2d 1462, 1467 (9th Cir 1990), *cert den*, 501 US 1210 (1991).

For the foregoing reasons, we reverse the trial court's grant of summary judgment and remand so that defendants have the opportunity to rebut the presumption in favor of plaintiffs' access to the lists. (6)

Reversed and remanded.

1. We presume that Shannon's claim matches the other plaintiffs', that is, he seeks a declaration that either the PRL or some constitutional provision compels the state to disclose jury pool information.

2. Whether jury lists are public records under the PRL is an open question; the "court records" referred to in ORS 192.410(4) may include only the records listed in ORS 7.010, which do not include jury lists. However, we need not decide that issue because we conclude that ORS 10.215(1) prohibits disclosure. Thus, if jury lists are *not* public records, ORS 10.215(1) prohibits disclosure by its own terms. If jury lists *are* public records, ORS 10.215(1) is one of the statutory exceptions to the PRL referred to in ORS 192.420(1). ORS 192.502(9). Although we presume that jury lists are public records and ultimately conclude that the PRL does not require courts to disclose them, that conclusion does not imply that the legislature could pass a statute that did contain such a requirement without violating separation of powers by unduly burdening the Judicial Department. Or Const, Art III, § 1.

3. Plaintiffs also cite ORS 1.025, ORS 7.110, ORS 8.125, ORS 192.420, ORS 192.430, and ORS 357.001. They offer no explanation of how those statutes "specifically" provide that jury records may be disclosed.

4. Defendants argue that plaintiff Shannon, the only plaintiff bringing constitutional claims under the Declaratory Judgment Act, ORS 28.010, lacks standing under that statute because he "seeks merely to vindicate a public right to have the laws of the state properly enforced and administered," *Eacret v. Holmes*, 215 Or 121, 125, 333 P2d 741 (1958), and has only "an abstract interest in the correct application or the validity of a law," *League of Oregon Cities v. State of Oregon*, 334 Or 645, 658, 56 P3d 892 (2002). We hold that those requirements do not apply when the right at issue is either the open courts provision of Article I, section 10, of the Oregon Constitution, or the "right of access to information about trials" under the First Amendment, because, as we discuss below, the courts have explicitly held that those rights belong to the public generally and not to any individual more than another.

5. *Accord Pantos v. City and County of San Francisco*, 151 Cal App 3d 258, 262, 198 Cal Rptr 489, 492 (1984) ("The master list of qualified jurors has the status of a judicial record, available to the public in general. There are no exemptions and no compelling reasons for nondisclosure.").

6. In order to prevent delay and the needless expenditure of judicial resources, we offer the following observation. Although protecting highly personal information about jurors may be an adequately compelling interest to override the presumption in favor of access, merely protecting their names and addresses is not, in the absence of unusual circumstances such as threats to their safety. *Press-Enterprise II*, 464 US at 511-12.

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Excerpts from the Marion Co. Circuit Court trial judge's letter opinions dismissing Plaintiffs' claims

"September 10, 2003

*** Dear Counsel, This matter came before the Court upon the Defendant's Motion for Summary Judgment. *** At least in the broadest definition, these jury lists are public records within the definition of ORS 192.410(4). Any request for public records such as occurred here by Plaintiffs creates a justiciable controversy. Simply in this case, the records sought by Plaintiffs are exempt from disclosure pursuant to ORS 192.502(9). Likewise, I have ruled that ORS 10.215 and 10.275 provide the exclusive means to compel production of the jury lists sought. This Court has subject matter jurisdiction to determine that the records sought are within the scope of these statutory provisions. Plaintiffs also raise certain constitutional claims concerning access to the Courts. The provisions of ORS 10.275 coupled with 136.005 provide a procedure for litigants to challenge the jury selection process. As Justice

Gillette noted in *SER Click v. Brownhill, ibid*, [331 Or 500 (2000)], a criminal defendant must have some process to challenge the jury selection process. The legislature has established such a process. That process meets constitutional mandates, *State v. Rogers*, 334 Or. 633, 55 P.2d 488 (2002). Plaintiffs make several arguments about policy and need for different procedures or more accessability to such records, particularly for non litigants. There arguments may be relevant to what the law should be in Plaintiffs eyes. Unfortunately for Plaintiffs, the legislature disagreed and established the procedure in ORS 10.215 and 10.275 and declined to allow access for those not directly involved in the process as litigants. The leglislature's decision in that regard is not constitutionally violative. Defendants are entitled to Summary Judgment dismissing Plaintiffs claims.
/Charles E. Luukinen, Circuit Judge/"[2]

"October 8, 2003
Dear Counsel: I have received and reviewed Plaintiff's Motion and Memorandum for Reconsideration on Summary Judgment, Defendant's Objection thereto and Plaintiffs' Reply to Defendant's Objection. I find that nothing raised by the Plaintiffs ***[therein] ***raises issues that were not presented in the original proceedings and decided adversely to the Plaintiffs. I have therefore signed the form of Order Allowing Defendant's Motion for Summary Judgement as well as the Judgement submitted by Mr. Castle and have delivered the same to the Marion County Court for filing.
/signed by Charles E. Luukinen, Circuit Judge/."[3]

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[2] The entire letter opinion is of record on appeal, Petitioners' Opening Brief, ER 46-49.
[3] The entire letter opinion is of record on appeal, Petitioners' Opening Brief, ER 50.

Excerpts from the Final Judgment and Sentencing Order [of death] of Petitioner Langley, entered in the public record of the companion death penalty case of *State v. Langley (Gray III)*, Marion Co. Cir. Ct. No. 88C21624, filed Feb. 03, 2006, entered Feb. 4, 2006, dated Feb. 3, 2006

Entered Feb. 04, 2006

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MARION

No. 88C21624

FINAL JUDGMENT AND SENTENCING ORDER

THE STATE OF OREGON, Plaintiff

vs.

Langley, Robert Paul Jr., Defendant

THIS MATTER came before the Court on an Indictment charging the Defendant with the crime of AGGRAVATED MURDER ***

The Defendant was tried by a Jury and, on November 30, 1989, unanimously found guilty of the crime of AGGRAVATED MURDER. On December 8, 1989, the Jury unanimously answered the four sentencing questions in the affirmative ,and the Court imposed a sentence of death. On November 18, 1993, the Oregon Supreme Court affirmed the Defendant's conviction for AGGRAVATED MURDER, set aside the sentence of death, and remanded the case to this Court solely for new sentencing proceeding. On November 10, 1994, the Jury unanimously answered the four sentencing questions in the affirmative. On February 2, 2001, the Oregon Supreme Court set aside the sentence of death and

remanded the case to this Court for a third sentencing proceeding. On November 9, 2005, the Jury unanimously answered the four sentencing questions in the affirmative.

THEREFORE, IT IS ADJUDGED that the Defendant, Robert Paul Langley, Jr., is convicted of the crime of AGGRAVATED MURDER ***[.]

***

IT IS FURTHER ORDERED that the Defendant Robert Paul Langley, Jr. is sentenced to death as provided in ORS 163.150(1)(f).

IT IS FINALLY ORDERED that the Marion County Sheriff, or his designee, shall immediately deliver the defendant to the Superintendent of the Oregon State Penitentiary.

Dated this 2 day of February, 2006.

/signed Joseph V. Ochoa, Circuit Court Judge/

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Miscellaneous statutory and court rule provisions not reproduced elsewhere.

ORCP Rule 57A. Challenging compliance with selection procedures. (A)(1). Motion. Within 7 days after the moving party discovered or by the exercise of diligence could have discovered the grounds therefor, and in any event before the jury is sworn to try the case, a party may move to stay the proceedings or for other appropriate relief, on the ground of substantial failure to comply with the applicable provisions of ORS chapter 10 in selecting the jury. (A)(2). Stay of proceedings. Upon motion filed under subsection (1) of this section containing a sworn statement of facts which, if true, would constitute a

substantial failure to comply with the applicable provisions of ORS chapter 10 in selecting the jury, the moving party is entitled to present in support of the motion: the testimony of the clerk of court administrator, any relevant records and papers not public or otherwise available used by the clerk or court administrator, and any other relevant evidence...(A)(3). Exclusive means of challenge. The procedures prescribed by this section are the exclusive means by which a party in a civil case may challenge a jury on the ground that the jury was not selected in conformity with the applicable provisions of ORS chapter 10.

Excerpts from the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Ed. 2003), published at 31 Hofstra Law Review 913 (2003)

Guideline 10.7 Investigation

Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty.***B. *** 2. Counsel at every stage have an obligation to satisfy themselves independently that the official record of the proceedings is complete and to supplement it as appropriate. ***

Commentary: At every stage of the proceedings, counsel has a duty to investigate the case thoroughly. *** Miscellaneous Concerns: ***Additional investigation may be required to provide evidentiary support for other legal issues in the case, such as challenging racial discrimination ... in the composition of juries. Whether within the criminal case or outside it, counsel has a duty to pursue appropriate remedies if the investigation reveals that such conditions exist.

Guideline 10.8 – The Duty To Assert Legal Claims.

A. Counsel at every stage of the case, exercising professional judgment in accordance with these Guidelines, should: 1. Consider all legal claims potentially available; and 2. Thoroughly investigate the basis for each potential claim before reaching a conclusion as to whether it should be asserted; and 3. Evaluate each potential claim in light of: (a) the unique characteristics of death penalty law and practice; and (b) the near certainty that all available avenues of post-conviction relief will be pursued in the event of conviction and imposition of a death sentence; and (c) the importance of protecting the client's rights against later contentions by the government that the claim has been waived, defaulted, not exhausted, or otherwise forfeited; and (d) an other professionally appropriate costs and benefits to the assertions of the claim. B. Counsel who decide to assert a particular legal claim should: 1. Present the claim as forcefully as possible, tailoring the presentation to the particular facts and circumstances in the client's case and the applicable law in the particular jurisdiction; and 2. ensure that a full record is made of all legal proceedings in connection with the claim. ***

Guideline10.10.2 (Voir Dire and Jury Selection)

A. Counsel should consider, along with potential legal challenges to the procedures for selecting the jury that would be available in any criminal case (particularly those relating to bias on the basis of race or gender), whether an procedures have been instituted for selection of juries in capital cases that present particular legal bases for challenge. Such challenges may include challenges to the selection of the grand jury and grand jury forepersons as well as to the selection of the petit jury venire. ***

Commentary. Jury selection is important and complex in any criminal case. In capital cases, it is all the more critical. Counsel should devote substantial time to determining the makeup of the venire ***[.] *** Bearing in mind that the history of capital punishment in this country is intimately bound up with its history of race relations, counsel should determine whether discrimination is involved in the jury selection process. Counsel should investigate whether minorities or women are underrepresented on the jury lists from which grand and petit juries are drawn, or if race or gender played a role in the selection of grand jury forepersons. ***

Excerpts from Briefing: Plaintiffs' Complaint filed Feb 2003[4]

"¶25. ***Defendant State of Oregon *** has chosen to seek the death penalty [in *State v. Langley, (Gray III)*] a third time. Langley is statutorily and constitutionally precluded from waiving a jury trial, pursuant to Or. Const. Art. 1 §11 and ORS 163.150. Langley sought pre-trial access to certain Marion County Circuit Court jury records, through a variety of means, and on a variety of statutory and constitutional bases, and all of his requests were denied. [fn 4 The facts reflecting Mr. Langley's efforts are contained in his Petition for Writ of Alternate Mandamus, Memorandum of Law in Support, and Excerpt of Records, see *State v. Langley*, [SC] S49849, *filed* October 20, 1002, *petition denied* Nov. 19, 2002.]. This action is not a substitute for an appeal, writ of mandamus, or a new trial in Plaintiff's criminal case. It is not a collateral attack on a prior judgment. The Court in

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[4] A copy of the full Complaint was included in Plaintiffs' Excerpt of Record attached to Plaintiffs' Opening Brief before the Court of Appeals.

Plaintiff's criminal case did not have jurisdiction over, and thus did not rule upon, Plaintiff's Public Records Request.
***

"¶26. On Dec. 18, 2002 Langley filed a Notice of Intent to Pursue and Exhaust Remedies [under ORS 192], in his pending criminal case. (Exh. B69-B71). *** In a letter dated February 14, 2003. Defendants OSCA and OJD denied Langley's second public record request, and intimated that any future like requests for such records would be "futile." (Exh B110). In a letter dated February 18, 2003, the Attorney General denied Langley's petition regarding this public records request (Exh B111-B112). The documents referred to in this paragraph are attached as Exhibits B and incorporated hereto by reference." (pages 15-20 of Complaint, pages 15-20 ER Court of Appeals).
***

"¶30. Plaintiff JSRC has a right to access, review, and analyze State Circuit Court jury source, master and term lists, and information therein, as a matter of public right, pursuant to ***the 1st and 14th Amendments to the U.S. Constitution. The records and lists are not sealed, and any governmental or private interest(s) in confidentiality are (i) outweighed by the public interest in disclosure and (ii) sufficiently safeguarded by other pre-existing laws [fn 6, citing to ORS 1.006, 1.010, 1.025, 10.205, 192.430, ORCP 17, ORCP 36(C) and ORCP 55(B)(1)]. Prohibiting public access to jury records violates state and federal constitutional provisions." (Page 20-21)

"¶31. Plaintiff Langley on behalf of himself and prospective Marion County jurors, has a right to access, review and analyze State Circuit Court jury source, master and term lists, and information contained therein, as a matter of public right, under ORS chapter 192. The jury lists are not sealed, and any governmental or private interest(s) in confidentiality are (i) outweighed by the

public interest in disclosure and (ii) sufficiently safeguarded by other pre-existing laws." (page 21)

"¶32. Plaintiffs JSRC and Shannon are (i) not facing a jury trial and (ii) not eligible to file a challenge under ORS 136.005 or ORCP 57A.

"¶33. Plaintiff Langley does not possess any facts to include in an affidavit required under ORS 136.005. ***The facts contained in the State Court jury records may provide a factual basis for Langley challenging his jury venire on behalf of himself or prospective Marion County jurors. The State Court jury records are essential to meeting the "needs" and vindicating the "legal rights" of Langley and prospective Marion County jurors, as those terms are used in ORS 192.001(2). The State Court jury records are not available from any other custodians except Defendants." (page 21-22)

"¶41. No Court has ordered the State Court jury lists sealed." (page 25).

"¶48. One or more of the following laws "specifically provide" for the disclosure of State Circuit Court jury records to Plaintiffs and others similarly situated, within the meaning of ORS 10.215(1): *** 1st Amendment *** 6th Amendment *** 9th Amendment *** and/or the 14th Amendment to the U.S. Constitution. ¶49. ORS 10.215 conflicts with [the] *** 1st Amendment *** 6th Amendment *** 9th Amendment *** and/or the 14th Amendment to the U.S. Constitution." (pages 27-28).

"¶52. Plaintiffs are entitled to their costs, disbursements and reasonable attorney fees pursuant to ORS 192.490(3) and/or ORS 28.110. Plaintiffs bring this matter to vindicate and protect their rights, and the rights of all

members of the public including litigants, researchers, and prospective jurors." (page 29).

"¶53. RELIEF SOUGHT. Plaintiff JURY SERVICE RESOURCE CENTER seeks the following relief pursuant to ORS 192.450(2) and ORS 28.100: I. AN ORDER ENJOINING DEFENDANTS FROM: *** (b) withholding State Court jury records used by Lincoln County Circuit Court from the JSRC and requiring Defendants to produce [the lists to JSRC]; *** AN ORDER DECLARING *** (c) that one or any of the following laws are laws that "specifically provide" for the disclosure of State Court jury lists to him within the meaning of ORS 10.215: *** ORS 192.430 *** the 1st Amendment to the U.S. Constitution, the 6th Amendment to the U.S. Constitution, the 9th Amendment to the U.S. Constitution, and/or the 14th Amendment to the U.S. Constitution[.]" the 1st, 9th and/or 14th Amendments; *** (f) that JSRC has a right under *** the 1st Amendment *** the 6th Amendment and/or the 14th Amendment to the U.S. Constitution to access State Court jury records. III FOR A JUDGMENT awarding Plaintiff JSRC its costs, disbursements, and a reasonable attorneys' fees incurred in this proceeding, pursuant to ORS 28.111; and IV. For such other relief as the Court deems equitable and just." (Page 31-32 of Complaint; page 31-32 of ER, Court of Appeals)

"Plaintiff SHANNON seeks the following relief pursuant to ORS 28: V: AN ORDER DECLARING (a) that one or any of the following laws are laws that "specifically provide" for the disclosure of State Court jury lists to him within the meaning of ORS 10.215: ***the 1st, 9th and/or 14th Amendments; *** (d) that Shannon and similarly situated persons have a right under... the 1st, 9th Amendment and/or the 14th Amendments to the U.S. Constitution to access State Court jury records. VI. FOR A JUDGMENT (a) awarding Plaintiff SHANNON his costs, disbursements, and a reasonable attorneys' fees

incurred in this proceeding, pursuant to ORS 28.111; and VII. For such other relief as the Court deems equitable and just." (Page 32 of Complaint; page 32 of ER, Court of Appeals)

"Plaintiff LANGLEY seeks the following relief pursuant to ORS 192.450(2):
VII. AN ORDER ENJOINING DEFENDANTS FROM (a) proceeding with any criminal trial proceeding against Langley until such time as the issue of Defendants' withholding of jury records is fully and finally resolved by a final order of court; *** IX AN ORDER DECLARING *** (c) that one or any of the following laws are laws that "specifically provide" for the disclosure of Marion County Circuit Court jury lists to Plaintiff and other others, within the meaning of ORS 10.215(1): ***ORS 191.001, ORS 192.430 *** the 1st Amendment to the U.S. Constitution, the 6th Amendment to the U.S. Constitution, the 9th Amendment to the U.S. Constitution, and/or the 14th Amendment to the U.S. Constitution[.]" (Page 33-35 of Complaint; page 33-35 of ER, Court of Appeals)

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Excerpts from Briefing at the trial court level: Excerpt from Petitioner Langley's Notice of Intent to Pursue and Exhaust Remedies as to Jury Pool Records, filed in his death penalty case, *State v. Langley (Gray III)*, Marion Co. Case No. 88C21624, Notice dated Dec. 18, 2002, and made of record in his civil action on Feb. 25, 2003.[5]

[5] Langley referenced this criminal case Notice in the civil Complaint at paragraph 28 attaching a copy at Exh B69-B71, and a copy of the Notice was again provided as an Attachment to Plaintiffs' opening Appellate Brief, Court of Appeals, at ER 37-38).

"Defendant, through counsel, notifies this Court of his intention to fully pursue and exhaust his administrative and judicial remedies in seeking access to jury lists and other jury records. *** Defendant specifically advises the Court that upon filing a declaratory judgment action relative to the jury list and records that he will move this Court for a stay of the proceedings during the pendency of the civil action. Defendant further advises the Court that a declaratory judgment action may take, in the estimate of the Oregon Supreme Court, a period of up to two years. Defendant notes that the Oregon Supreme Court has contemplated [a defendant's] use of public records laws in relation to jury lists and records [citing to oral argument in capital mandamus *State v. Staudinger*, SC S 47781, side two of tape of proceedings, March 2, 2001, case decision reported at 31 P.3d 426, 332 Or. 477 (2001)]. Defendant relies upon all of the rights underlying his efforts to obtain access to the jury lists and records under the Oregon and United States Constitutions including his rights to open justice, public trials, impartial juries, due process of law and equal protection of the laws. He further relies upon his rights to present and prepare a defense under the Oregon and United States constitutions and to make a record subject to review in higher courts. Dated this 18 day of December 2002

/signed by Karen A. Steele, Attorney for Langley, Jr./

Excerpts from Briefing: Excerpts from Defendants' Brief filed in the Court of Appeals of Oregon.

"No provision of the state or federal constitution that plaintiffs have cited entitles anybody to obtain jury-pool records by any means other than filing a motion challenging a jury panel." (page 11)

"Thus, when ORS 10.215 states that the State Court Administration and circuit courts "may not disclose" jury-

pool records "except as specifically provided by law," it creates an absolute prohibition against disclosure of the records except as specifically permitted by another statute. See ORS 174.100(4). ORS 10.275 confirms the legislature's intent that jury-pool records not generally be subject to publication[.]" (page 14)

"ORS 10.275 is the only statute that specifically provides for the disclosure of jury-pool records and only litigants who file proper jury-panel challenges may take advantage of the procedure that the statute sets forth. No other person is entitled to obtain the records under ORS 10.275 and no other statute creates an alternative process by which non-litigants may obtain these documents." (page 18)

"[The trial court] ruled – as a matter of law – that plaintiffs were not entitled to get jury-pool records by making a public-records request because ORS 10.275 provides the sole means by which anybody may obtain those documents." (page 24)

"Although the trial court ruled in defendants' favor on other grounds, rejecting plaintiffs' constitutional arguments on the merits, this court may affirm on the alternative basis that plaintiffs lacked standing[.]" (page 25)

"[T]he [First Amendment] right applies only where "public access plays a significant positive role in the functioning of the particular process in question. *** Thus, the Supreme Court has held that a limited right of public access exists to preliminary hearings in criminal cases because they "are sufficiently like a trial" to justify the conclusion that public access is "essential to the proper functioning of the criminal justice system." *** For the same reason, the public has a limited right of access to voir dire proceedings in criminal cases. *** [These] considerations *** [and] the limited First Amendment

right of access to certain criminal court proceedings do not apply to plaintiffs' request to obtain jury-pool records." (page 30)

"Plaintiffs also assert that blocking access to jury-pool records deprives them of an "opportunity to vindicate their constitutional rights to equal opportunity for jury service." (page 48). ***

"Plaintiffs flatly assert that a law making jury-pool records confidential would shield possible misconduct by state employees in violation of ***the First, Sixth and Fourteenth Amendments to the United States Constitution." (page 35-36)

"[A]ny factual disputes that may exist regarding the degree to which the public has an interest in disclosure of jury-pool records – are not relevant to the legal issues decided by the trial court and before this court on appeal ***[including] whether [the statute] violates the constitutional provisions on which plaintiffs' reply. There may be facts in dispute, but they are not material to [the] dispositive legal questions[.]" (page 39)

"[P]laintiffs claim that, by failing to require defendants to file an answer, the trial court "shouldered the pleading burden for Defendants on the *substantive merits* of Plaintiffs' constitutional claims, which Defendants had steadfastly avoided answering and briefing." (App Br 49-50; emphasis in original). *** [T]he court saved judicial resources by correctly granting defendants summary judgment *** as a matter of law. Because plaintiffs' claims lacked legal merit, a requirement that defendants file an answer would have served no useful purpose." (page 40).

/signed Erika L. Hadlock, Asst. Attorney General, served May 20, 2004/

Excerpts from Briefing: Excerpts from Plaintiffs' Reply Brief filed in the Court of Appeals of Oregon.

"Plaintiffs' constitutional arguments were well developed prior to trial (Plaintiffs' Complaint Exh. B82, B84-103; Plaintiffs Mot. Opp. SJ pg 19-42 and Exh. C19-24), and at trial (Tx. 34, 36-53, 62). Defendants have answered them and the court should reach these claims. [fn 5: Defendants concede that the constitutional claims were properly before the trial court. Def. Brf. Pg 36 n 17]. Defendants have newly argued two justifications for the statute as it pertains to Plaintiffs: (1) the need to protect the privacy of potential jurors and (2) the need to avoid possible harassment of jurors, neither of which evils appears in the statute itself. [fn 6 in relevant part: ***Defendants did not argue that disclosure to Plaintiffs is prohibited in order to *protect possible jurors from Plaintiffs*, until they voiced this argument *for the first time* in their Appellees' Brief. "It is eminently rational for the legislature to decide that potential jurors' interests in privacy and in avoiding potential harassment are outweighed only by the interest that litigants facing jury trials have in ensuring that their jury panels represent a fair cross-section of the community, and not by any abstract interest that other people may have in obtaining information about jury pools." (Def. Brf., pg 33)] (page 3)

"Defendants argue that ... the First Amendment [does not] contain a right of "access" to jury lists, citing to... *Houchins*, which [is] not on point. The U.S. Supreme Court has not yet ruled on the issue of access to state court jury lists, but is has taken up matters quite close, and those cases control the outcome of this case. See e.g.,

Test v. U.S., *** and *L.A. Police Dept. v. United Reporting Publishing Co.*[.] *** [fn 13, citing also to *Carter v. Jury Comm'n of Greene County*: *** Under *Test* and *Carter*, Plaintiffs have an unqualified right to inspect the jury lists. If Plaintiffs cannot see the jury lists, they – like Mr. Test – will be unable to determine – among other things – whether there is a potentially meritorious jury challenge to be made.] [fn 14 discussing *LAPD v. URPC*, 528 U.S. 32 (1999); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); *Greater New Orleans Broadcasting Assn., Inc. v. U.S.*, 527 U.S. 173 (1999); *Cox Broadcasting Corp.*, 420 U.S. 469 (1975); and *Perry v. Sindermann*, 408 U.S. 593 (1972)]. *** Public access to jury lists... has... a long national history [citing to Plaintiffs' Brf 11-14, and relying on *Press-Enterprise I*, 464 U.S. 501 (1984) and *Press-Enterprise II* (478 U.S. 1 (1986) and *Rubin v. Coors Brewing Co., supra*] (pages 6-9)

"Access to state jury lists is necessary in order for prospective jurors to vindicate their statutory...and constitutional rights to be fairly and equally included or excluded from state court jury serve, to speak freely about jury lists[.] *** Forcing Plaintiffs to rely on third-parties (litigants who have access under ORS 10.275) to vindicate Plaintiffs' constitutional rights is both unrealistic and unconstitutional. [citing in part to *Powers v. Ohio*, 499 U.S. 400 (1991); *Campbell v. Louisiana*, 523 U.S. 392 (1998)]. (page 13)

Sealing of judicial department administrative records – records that reflect *how* the Judicial Department compiled the lists, *who* was *eligible* to be summoned for paid state court jury service, and *who was or wasn't summoned* – requires an exercise of the judicial power of the state: it cannot be performed by the legislature, even at the Court's request. *** Sealing the jury lists is "an outright hindrance" of the duty of state and federal courts to hear and adjudicate state court jury challenges that can and will only be brought if the public (including litigants such

as plaintiff Langley) can access and analyze the actual state court jury lists, and then marshall the lists as evidence. [fn 28, citing to U.S. Attorney Gen. Ramsey Clark's testimony to Congress, citing to Plaintiffs' Mot. Opp. SJ, pg 23 n 44 and pg 27 n47, and 39 Willamette Law Review 557, 639 n 252 (2003)]." (page 14-15)

Excerpts from Briefing: Excerpts from Defendants' Petition for Review filed in the Oregon Supreme Court.

"Question presented *** Does the First Amendment give the public a presumptive right of access to jury-pool lists that the Judicial Department compiles for use in the judicial system as a whole, long before prospective jurors are selected at random from those lists to un 'ergo voir dire in association with any criminal trial? Answer and proposed rule of law[.] No. The First Amendment open-trials doctrine is limited to proceedings that relate to a specific criminal trial, like the trial itself, pretrial hearings and voir dire of prospective jurors who are examined for suitability in a particular case. It does not extend to those administrative aspects of the judicial system, like compilation of jury-pool lists, that operate independently of any given criminal prosecution." (pg 4).

***

"In the discussion that follows, defendants first explain the ways in which JSRC represents a significant expansion of First Amendment doctrine. Defendants then outline some of the practical implications of opening jury-pool lists to public scrutiny, including weakening of legislative and congressional efforts to maintain the confidentiality of records from which those lists are compiled.

A. The case presents significant questions respecting the scope of the public's First Amendment right of access to criminal trials." (pages 4-5)

***

"B. The Court of Appeals' decision will significantly affect the state's ability to protect the confidentiality of individuals' identifying information. ***" (page 11)

"The [Court of Appeals decision] eviscerates [the] protective scheme [of ORS 10.275(3)(b), permitting [a] court to forbid litigants from re-disclosing the records...] by holding broadly that the public at large has as presumptive right of access to those records. *** If a member of the public demands a copy of [the source] list under JSRC, there simply is no practical way either to alert each person listed that his name and address are about to be made available to the requestor or to provide that person a timely opportunity to establish reasons why his identifying information should not be released." (page 12)

"[O]n May 29, 2005, counsel for plaintiffs filed a motion in a Multnomah County criminal case [*State v. Tracy Lynn Krueger*, a death penalty case] for access to "the source, master and term jury lists for *** 2003, 2004 and 2005." App-1 to App-2. The motion purports to be filed not only on behalf of he defendant in that criminal case, but also "on behalf of prospective Multnomah County jurors, and the general public." App-2."

Excerpts from Briefing: Excerpts from Plaintiffs' Response to Defendants' Petition for Review filed in the Oregon Supreme Court.

"The trial court [ruled] that the jury lists were in fact public records for purposes of [Oregon Public Records Act] ORS 192 et seq. The consequence of the Court of Appeals' decision is that ORS 10.215(1) has been held unconstitutional because it conflicts with and is trumped by the 1st Amendment to the U.S. Constitution. The lists are now presumptively accessible to the public... *** [S]ince ORS 10.215 (1) has been held unconstitutional, the lists are

now also presumptively accessible under [Oregon Public Records Act] ORS 192 et seq. ORS 10.215(1) no longer qualifies for an exemption t disclosure under ORS 192.420(1) and ORS 192.502(9)." (page 2-3).

"*Houchins v. KQED, Inc.*, 438 US 1 *** (1978) – relied upon by Defendants at Pet. 5 n 1 (see also Respondents Brief pg 29) is not on point or helpful to Defendants. In a narrow opinion, the U.S. Supreme Court held that neither the media nor the general public had rights to enter and film the inside of a prison, explicitly relying on the need for heightened prison security and the other easily available and reliable sources from which information about prison conditions could be obtained. *Houchins*, 438 at 9-11, 15. Here, there are no other available, reliable sources for the jury lists. *** Defendants have not disputed or controverted these core factual assertions." (page 4)

"[T]his lawsuit is not about the Judicial Branch – or its Administrative Office – per se. It would apply equally to any person or entity charged with compiling the state court jury lists. Currently, Defendant State Court Administrator compiles and "holds" the Oregon lists, but this could change in the twinkle of a legislative act." (page 5)

"The only purpose for compiling an annual source and master jury list is to provide a fair cross section of local, prospective jurors for civil and criminal trials. ORS 10.215. The source and master jury list is both empirically and temporally related – by statute and state and federal constitution – to every jury trial in every state court case. Public jury lists are the foundation of every state court jury trial." (page 5)

"Defendants' cry for individualized notices to drivers and voters every time anyone asks to see the jury lists *** (Pet 12 L 16 n 5) is an exaggerated response and not buttressed by any authority. Indeed, because of this well-known and public nature of the ODOT and voter registration lists there

are longstanding Oregon statutes that allow qualifying individuals to mask their ODOT or voter registration addresses or seek individualized protective orders. See ORS 802.250 (ODOT); ORS 247.965 (voter list). Defendants make no argument or showing that these statutes are insufficient. Defendants' objections based on 18 USC §§2721 and 2725, and the ORS ch 802 provisions (Pet 13) were not made or preserved at trial or at the Court of Appeals. Defendants do not even bother to recite the text of these laws, and for good reason: the text reveals that the laws are not on point [fn 11: citing to 18 USC Section 2721 (b) Permissible Uses *** (4)]. Further, Defendants have no standing to raise 18 USC 2721 in this action. Violation of 18 USC §§ by ODOT is a crime and the US Attorney has exclusive jurisdiction. Civil actions regarding violations must be brought in federal court [fn12 citing to 18 USC 2723 and 2724]. *** Given the broad range of permissible disclosures under 18 USC §§2271 et seq *** Plaintiffs further qualify to see the lists under [LAPD v. URPC] and other cases cited [Plaintiffs Reply Brief Court of Appeals pages 6-9]." (Pages 9-13).

Excerpts from Briefing: Plaintiffs' Brief before the Oregon Supreme Court

Beginning at page 5:

"After holding that the First Amendment trumped ORS 10.215(1), the Court should have gone back and re-examined the PRL [Public Records Law] claim. As that court stated, if ORS 10.215(1) is void in relevant part under the 1st Amendment (or pursuant to any other constitutional provision), it no longer qualifies as a statutory exception under ORS 192.420(1) or ORS 192.502(9). [fn 6: As the Court of Appeals acknowledged:

> Of course, if some constitutional provision confers on plaintiffs a constitutional right of access to the information, the fact that a statute permits denial

> of access is irrelevant; the statute would be unconstitutional.

JSRC v. Carson, 199 Or App at 115.]. In those circumstances, Plaintiffs argued that public access to the jury lists can be had under the PRL." (page 6)

b. [T]he 9th Amendment to the U.S. Constitution can be relied upon to protect the people's right to see and inspect jury lists – no matter what entity compiles the lists. *** Whether one interprets *** the 9th Amendment under a "unenumerated rights" view, or a "limited government" view, the result here is the same. The public nature of jury lists is fundamental, because the right to a jury trial (whether civil or criminal) was and is fundamental. Therefore, the people's right of access to jury lists cannot be restricted by the government, including by resort to the lack of an explicit (postive) right of access, as claimed by Defendants relying on ORS 10.215." (page 13)

"F. 1st Amendment Claims.
a. The decision of the Court of Appeals on Plaintiffs 1st Amendment claim should be affirmed in part.

Plaintiffs rely on the Court of Appeals analysis, page in addition to Plaintiffs' briefs and arguments below.

b. Defendant's defense that the larger jury lists are not "associated" with any specific trial or criminal proceeding is wrong as a matter of fact and law.

Defendants' curious insistence that the larger jury lists "are not associated with any specific trial or criminal prosecution" is empirically wrong. Jurors for a particular case do not spring "out of the earth, and suddenly, like mushrooms, come to full maturity..." on the floor of the circuit court.[6] ORS Chapter 10 mandates that prospective

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[6]Thomas Hobbes, *Philosophical Rudiments Concerning Government and Society* in *The English Works of Thomas*

jurors summoned for jury duty in every individual case *must* first be included within, and then randomly selected from, the larger lists that Plaintiffs seek to access. Defendants' position that the larger "jury pool records...do not form part of a particular trial" would surely be news to the U.S. Supreme Court, whose opinions require that challenges to a venire based on unsatisfactory cross-representativeness be supported by empirical analysis of the larger term and master lists. See, e.g., *Taylor v. Louisiana*, 419 U.S. 522, 538, 42 L Ed 2d 690, 95 S Ct 692 (1975) (the requirement of a fair cross-section does not guarantee that juries by of any particular composition, or that venires be a substantially true mirror of the community, all that is required is that the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonable representative thereof).[7] Plaintiffs submit that Defendants' position would also surprise Oregon district attorneys and the state and federal bench.[8] Defendants

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Hobbes, ed. Sir William Molesworth (London: John Bohn, 1841), Vol. 2, Chap. 8.

[7] See also, *Powers v. Ohio*, 499 U.S. 400 (1991) (defendant's challenge on behalf of excluded prospective jurors); *Campbell v. Louisiana*, 523 US 392 (1998) (same).

[8] See e.g., State *v. Walton*, 311 Or 223, 245-246, 809 P2d 81 (1991) (defendant failed to meet burden of proving systematic exclusion of cognizable groups from grand jury, "the record contains no evidence regarding the racial make...of the venire from which the grand jury was randomly selected..." (citing to *Batson* and discussing *State ex rel Schrunk*)); *State ex rel Schrunk v. Walker, Ellis, and Snouffer*, 308 Or 398, 780 P2d 731 (1989) (challenging whether Multnomah County had complied with the pertinent procedural statutes in compiling its master jury lists); *State v. Gortmaker*, 60 Or App 723

cite no authorities. Plaintiffs incorporate the authorities and arguments found in III. A Proper Remedy. (page 13-16)

G. 14th Amendment Equal Protection Claims.[9]

a. The Court of Appeals did not reach Plaintiff's 14th Amendment claims, and Defendants have waived any defense.

Plaintiffs' claimed below that allowing a subset of litigants access to the jury records but barring everyone else from access violated the rights of Plaintiffs under the 14th

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(1982) *affirmed* 295 Or 505 (1983) (challenge to list from which grand jury drawn); *Anderson v. Gladden,* 234 Or 614, 383 P2d 986 (1963) (challenge to jury list) later proceeding at *Anderson v.* Gladden, 303 F Supp 1134, 1137 (discussing relevance of master list to jury challenge); State *ex rel Venn v. Reid*, 207 Or. 617 (1956) (whether presiding judge had complied with statute in compiling larger jury list from which grand jury was drawn); *Garner v. Alexander,* 167 Or. 670 (1941) (challenge to practice of excluding women from jury lists); *U.S. v. Mitchell,* 136 F 896 (1905) *(discussing compilation of master jury list); State v. Carlson*, 39 Or 19, 62 P 1016, 62 P 1119 (1900) (describing compiling of the Circuit Court jury lists in Oregon); *State v. Fitzhugh* 2 Or 227 (1867) (complaining that sheriff had not summoned jurors from official jury list).

[9] The 14th Amendment to the U.S. Constitution provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment equal pr[illegible]ion clause. Defendants agreed that limiting access is [illegible]ctly what the Legislature meant to do (Plaintiffs' CoA Brief, ER-41 L 4-5; ER-44 L 2-4), and there was no bar under Article I section 20. Defendants failed to make an argument in the Court of Appeals against Plaintiffs' 14th Amendment equal protection claims.[10] This Court should find in Plaintiffs' favor on those claims. Plaintiffs explicitly cited to the 14th Amendment in the Complaint, and in their CoA Reply Brief (pages 6-8 and notes 13-15; pages 11-12) and to cases decided under it (*Carter v. Jury Comm'n of Greene Co.*, 396 US 320 (1970); *Powers v. Ohio*, 499 U.S. 400 (1991); *Campbell v. Louisiana*, 523 US 392 (1998)), and to case law discussing its application in relation to 1st Amendment claims (*LAPD v. URPC*, 528 US 32 (1999)).

b. There is no legitimate purpose or rational reason to limit public access to jury lists to only those persons who are facing a jury trial and who already have sufficient facts to mount a challenge to their jury venire.

To their credit, Defendants do not dispute that for Mr. Langley, and those in like positions, access to the jury lists requires a formal challenge to the jury venire, accompanied by a *sworn* affidavit setting forth *facts* to support the challenge (ORS 10.275(1)). For those unwilling to perjure themselves and without any qualifying facts – "bare bones" or otherwise – no access is allowed. For Plaintiffs JSRC and Shannon, no access is allowed.

Defendants fail to show how the present scheme can possibly vindicate (a) the right of litigants to discover meritorious challenges to their jury pools, (b) the rights of prospective jurors to be assured that they are fairly and equally offered the opportunity for paid, state jury duty, or (c) the right of the community (including litigants and prospective jurors) to assure itself empirically, that the

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[10] The Court of Appeals did not address these arguments.

jury system is fundamentally fair and not in need of correction or improvement.[11]

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[11] In Johnson *v. California*, __ US __, 162 L Ed 2d 129, 125 S Ct 2410 (2005), the U.S. Supreme Court discussed the purpose of *Batson v. Kentucky*, 476 U.S. 79, 90 L Ed 2d 69, 106 S Ct 1712 (1986), in eradicating racial discrimination in jury selection. Plaintiffs here seek to vindicate purposes similar, and identical, to those in *Batson*.

> *Batson's* purposes further support our conclusion. The constitutional interests Batson sought to vindicate are not limited to the rights possessed by the defendant on trial, see 476 U.S., at 87, 90 L. Ed. 2d 69, 106 S Ct 1712, nor to those citizens who desire to participate "in the administration of the law, as jurors," *Strauder v. West Virginia*, 100 US 303, 308, 25 L Ed 664 (1880). Undoubtedly, the overriding interest in eradicating discrimination from our civil institutions suffers whenever an individual is excluded from making a significant contribution to governance on account of his race. Yet the "harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community. Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice. *Batson*, 476 U.S. at 87, 90 L Ed 2d 69, 106 S Ct 1712; see also *Smith v. Texas*, 311 U.S. 128, 130, 85 L Ed 84, 61 S Ct 164 (1940) ("For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but it is at war with our basic concepts of a democratic society and a representative government" (footnote omitted). The *Batson* framework is designed to produce actual answers to suspicions and inferences that discrimination

c. Plaintiffs have a 14th Amendment right to vindicate their statutory and constitutional rights, and to not be forced to rely on others doing so." (page 16-18)

"H. Remaining Statutory and Constitutional Claims.

Plaintiffs disagree with that portion of the Court of Appeals decision narrowly construing terms found in ORS Chapter 7. *JSRC v. Carson*, 199 Or App at 113. Given the historic record of how county clerks compiled jury lists, and what they did with them, Plaintiffs contend that the jury lists are "records" or "files" within ORS Chapter 7.

Defendants have dropped the argument, raised in their Petition, that "[t]he Court of Appeals' decision will significantly affect the state's ability to protect the confidentiality of individuals' identifying information."[12] This is appropriate in light of the protections and safeguards set forth under the Public Records Act (sufficient to protect DMV and Elections lists), and otherwise available as provided in the remedy set forth by the Court of Appeals. Defendants renewed citations to 18 USC §§2271, 2725, and ORS ch 802, fail to explain the relevance of those laws to this case in light of Plaintiffs',

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> may have infected the jury selection process. See 476 U.S., at 97-98, 90 L Ed 2d 69, 106 S Ct 1712, and n 20. The inherent uncertainty present in inquiries of discriminatory purpose counsels against engaging in needless and imperfect speculation when a direct answer can be obtained by asking a simple question.

Johnson v. California, __ US __, 162 L Ed 2d 129, 125 S Ct 2410 (2005).

[12] *JSRC v. Carson*, SC S52571, Defendants' Petition for Review, *Reasons For Granting Review, B*, pages 11-14, discussed only in passing at Brief page 25 n 10. Defendants do not assert that they have standing or a meritorious case under Title 18 or Title 28.

Response.[13] Plaintiffs rely on the prior briefing to support any remaining claims. (page 18-20)

"III. A PROPOSED REMEDY

A. Although many statutes and constitutional provisions support and provide for Plaintiffs' rights to access the jury lists, perhaps the most appropriate remedy in this case is to rule that Article I section 33 protects the people's retained right to see and inspect the jury lists – no matter what entity compiles or archives them. Pursuant to that ruling, access to the lists will be governed – at a minimum -- by the Oregon Public Records Act (PRL).

a. This remedy is available to the Court.

This Court could, no doubt, craft a narrow opinion holding that the public's jury lists – *no matter who compiles them* – must be accessible for public inspection, and are, *at a minimum*, embraced by the PRL.[14] The Court could do so, relying on the "retained rights" clause found in Or. Const. Article I section 33. As stated by Justice Linde in 1982:

> [I]f a procedure is "so rooted in the traditional conscience of our people as to be ranked as fundamental," the people of Oregon do not need the fourteenth amendment to protect it. I take article I, section 33 of the Oregon Constitution to preserve such "unenumerated" rights as were of constitutional magnitude in 1859, that is to say, rights specifically against government and "so rooted as to be fundamental."

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[13] *JSRC v. Carson*, SC S52571, Plaintiffs' Response to Petition for Review, pages 10-14.

[14] Doing so would also allow the Court to avoid deciding whether any other records, currently compiled and archived by court staff, are embraced under the PRL.

State v. Burrow, 293 Or 691, 712, 653 P2d 226 (1982) (Linde, J., dissenting, joined by Lent, C.J.). Because public jury lists are necessary to, and so inseparable from, the vindication of fundamental rights accorded to litigants and the community, including: the right to a fair and public trial criminal trial, [fn citing in relevant part to the Fifth and Sixth Amendments], the inviolate and preserved rights to civil trial, [fn in relevant part citing to Seventh Amendment of the U.S. Constitution], the right to be offered equal opportunity for jury service, [fn citing in relevant part to the Fourteenth Amendment] the right to rely upon and have confidence in jury verdicts rendered in your community, [fn citing in relevant part to Fourteenth Amendment to the U.S. Constitution] this remedy would be well within reason.

b. This remedy will promote public confidence in the Judicial Department.

By allowing fair and reasonable public access to the jury lists – including when Judicial Department staff assists in compiling them – the Court will alleviate current concerns that Defendants have something to hide in the way that there are compiling and managing the public's jury lists. It will send a clear signal that the highest Court in this state has no interest in giving Judicial Department staff (as compared to Elections or DMV staff) a special exemption from public inquiry or scrutiny with regards to compilation of the public's jury lists.[15] It will also demonstrate that this Court holds the PRL – and what it stands for -- in high esteem.

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[15] It is well known that Defendants counsel have regularly suggested that criminal defendants could and should spend precious taxpayer funds simulating jury lists for study, by way of purchasing DMV and election lists and analyzing those, before seeking access to the actual lists compiled by Defendants.

c. This remedy will protect all interested persons.

Because the PRL provides substantial procedural safeguards and remedies that the public and the jury list record custodian(s) may rely upon, this scheme provides the best protection for all interested. Defendants have made no showing that these procedural schemes are unworkable or insufficient.

d. This remedy will protect Plaintiffs and Defendants in the event the Legislature amends the law to mandate that list compilation be removed from the Judicial Department and/or privatized.

Presumably, the Legislature could reassign the job of compiling jury lists to another branch of government (e.g., the county clerks). Plaintiffs doubt that Defendants or this Court would stand for the idea that compilation of the public's jury lists could be wholly privatized and/or kept secret from the Court. Importantly, the remedy suggested by Plaintiffs would set in place safeguards equally applicable to everyone, no matter who is -- or may become -- the official compiler and custodian of the jury lists.

e. This remedy will lessen the burden on the trial courts.

Routing requests for jury lists through the Public Records Act will promote efficiencies at the trial level. Circuit Court judges will not have to act as the initial gatekeeper for these requests.[16] Motions to stay for want of jury records will not plague cases, and fewer errors will be included on appeal, based on denial of access to jury records. Litigants will be able to focus their energies on analyzing the records. For indigent defendants, this will result in cost savings for the public.

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[16] This will alleviate a current burden on criminal trial judges. Trial judges would be called upon to adjudicate formal challenges to a particular list or venire.

If instead, this Court rules that access under the Public Records Law is not available, it is likely that Defendants will require Circuit Court judges to adjudicate each and every request for access to the lists, not just those that are raised in a pending jury trial, and accompanied by a full-on challenge to a particular jury venire.

IV. CONCLUSION

Plaintiffs urge this Court to uphold that portion of the Court of Appeals decision pertaining to the 1st Amendment, and reverse the decision below on Plaintiff's other claims. In addition, Plaintiffs ask this Court to rule that the public's jury lists – *no matter who compiles them* – are open for public inspection." (page 20-22)

/signed Rose Jade, May 6, 2006/

Excerpts from Briefing: Plaintiffs' Petition for Reconsideration (before the Oregon Supreme Court) filed May 2006

SUMMARY OF PLAINTIFFS' PETITION FOR RECONSIDERATION

This case raises extremely important constitutional questions of first impression regarding the extent to which a state may restrict court-supervised public access to state court jury lists.

Plaintiffs seek clarification as to whether the Court considered Plaintiffs federal claims under the Ninth and Fourteenth Amendments (equal protection and due process), and reconsideration of two core conclusions made by the Court regarding Plaintiffs' First Amendment claim: that there is no record reflecting historical public access to the jury lists; and that public access plays no significant role in the preparation of the jury lists.

THE INTERESTS INVOLVED IN THIS CASE

Oregon law mandates that jurors will be drawn from a fair cross section of the community (ORS 10.215),[17] that the master list will contain a certain percentage of the community (ORS 10.215),[18] that the master and terms lists be drawn randomly from the larger lists (ORS 10.205, ORS 10.215),[19] that jurors who are deferred be added to the following term list (ORS 10.055),[20] that

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[17] ORS 10.215 provides in relevant part:

> Master jury list; sources; contents. (1) The State Court Administrator shall cause to be prepared at least once each year a master jury list containing names selected at random from the source lists. The source lists are the most recent list of electors of the county, the records furnished by the Department of Transportation as provided in ORS 802.260 (2) and any other sources approved by the Chief Justice of the Supreme Court that will furnish a fair cross section of the citizens of the county.***

[18] ORS 10.215 provides in relevant part:

> Master jury list *** (3) The number of names placed on a master jury list shall be sufficient to meet the projected need for grand jurors and trial jurors in the circuit court in the county, but the total number shall not be less than two percent of the population of the county according to the latest federal decennial census.

[19] ORS 10.205 provides in relevant part:

> (2) *** [T]he selection [of jurors] must be done randomly. (3) *** [T]he selection [of jurors] must be done randomly.

[20] ORS 10.055 provides:

> Deferment of jury service. A judge of the court or clerk of court may allow, for good cause shown, a

prospective jurors will not be discriminated against on various bases (ORS 10.030),[21] and that jury records be preserved (ORS 10.215, 10.255, 10.265).[22]

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person summoned to serve as a juror for a particular jury service term to defer jury service to any other term beginning within one year after the end of the term for which the person was summoned. The name of a person allowed to defer jury service shall be included with the names of persons to be summoned as jurors for the subsequent term to which jury service is deferred.

[21] ORS 10.030 provides in relevant part:

Eligibility for jury service; discrimination prohibited. (1) Except as otherwise specifically provided by statute, the opportunity for jury service shall not be denied or limited on the basis of race, national origin, gender, age, religious belief, income, occupation or any other factor that discriminates against a cognizable group in this state.***

[22] ORS 10.215 provides in relevant part:

Master jury list. *** (5) A master list shall be certified by the trial court administrator and placed on file in the circuit court as soon as possible after it is prepared. (6) *** When a newly filed master jury list becomes effective, all orders, records and papers prepared in connection with the selection process based on the previously filed master jury list shall be preserved by the trial court administrator and State Court Administrator for the period prescribed by the State Court Administrator under ORS 8.125.

ORS 10.255 provides in relevant part:

Record of persons summoned to serve as jurors. The clerk of court shall cause to be prepared a

Oregon law also provides a cause of action for those state court litigants who have been indicted by a grand jury or who are facing a jury, and who possess facts to challenge the local jury system on the basis that there has been a material departure from the law in compiling the lists or selecting the jurors (ORS 136.001, ORS 136.005, ORCP 57).[23] For litigants, such challenges must

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record on all persons summoned to serve as jurors for a jury service term in a county, specifying: (1) Those who did not attend. (2) Those who were discharged for ineligibility to act as jurors. (3) Those who were discharged for any other reason. (4) Those whose jury service was deferred and the term to which jury service of each was deferred. (5) Those who attended and were not discharged or deferred. (6) The per diem fees and mileage due to each entitled thereto.

ORS 10.265 provides in relevant part:

> Preservation of jury orders, records and papers. After the end of a jury service term in a county, all orders, records and papers prepared in connection with the selection and summoning of persons to serve as jurors for the term *** shall be preserved by the clerk of the court[.]

[23] ORS 136.001 provides in relevant part:

> Right to jury trial; waiver. (1) The defendant and the state in all criminal prosecutions have the right to public trial by an impartial jury. ***

ORS 136.005 provides:

> Challenge to jury panel. (1) The district attorney or the defendant in a criminal action may challenge the jury panel on the ground that there has been a material departure from the requirements of the law governing selection of jurors by filing a motion with the court supported by an affidavit alleging

be made prior to the swearing of the jury, or within other deadlines, or else they are deemed waived. The litigant has the burden of establishing the material departure from the law. A material departure from the law would include discrimination against prospective jurors that is unlawful under the 14th Amendment. See, e.g., *Strauder v. West Virginia*, 100 U.S. 303 (1880) (race); *Whitus v. Georgia*, 385 US 545, 550 (1967) (race); *Carter v. Jury Commission of Greene County*, 396 U.S. 320 (1970) (race); *Batson v. Kentucky*, 476 U.S. 79 (1986) (race); *Johnson v. United States*, 520 U.S. 461, 468-469 (1997) (race); *Taylor v. Louisiana*, 419 U.S. 522 (1975) (gender); *Duren v. Missouri*, 439 U.S. 357 (1979) (gender); *JEB v. Alabama ex rel TB*,511 U.S. 127 (1994) (gender).

Oregon statutes and federal law provide a state and/or federal cause of action for prospective or empanelled jurors who are unlawfully discriminated against, with regard to eligibility for jury duty, in violation of state or federal law. Again, the prospective

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facts that, if true, constitute a material departure from the requirements of the law governing the selection of jurors. The party making the motion shall serve the motion and supporting affidavit on the other party, the trial court administrator and the State Court Administrator.

(2) A challenge to the panel shall be made before the voir dire examination of the jury.

(3) If the court determines that there has been a material departure from the requirements of the law governing selection of jurors, the court shall:

(a) Stay the proceedings pending the selection of a jury panel in conformity with the applicable provisions of law; and

(b) Grant such other relief as may be appropriate.

(4) The procedures prescribed by this section are the exclusive means by which a district attorney or defendant may challenge a jury panel.

juror has the burden of establishing a violation of the law. The United States Supreme Court has gone to the extraordinary and unusual length of granting criminal defendants third party standing to vindicate the rights of prospective jurors because "the barriers to a suit by an excluded juror are daunting." See e.g., *Powers v. Ohio*, 499 U.S. 400, 416 (1991). The U.S. Supreme Court also held that "courts are under an affirmative duty to enforce the strong statutory and constitutional policies embodied in [the federal jury statute]." *Powers*, at 416.[24] As discussed below, Oregon's 1975-era jury related statutes were modeled on the federal jury statute. The recent (2001) statutory amendment curtailing public access to the jury lists is a glaring deviation from the federal statute.

Litigants, prospective jurors, and the community at large share an interest in the state's compilation of jury lists because of the democratic and public nature of our American judicial system, and the role that jurors are mandated to play *on behalf of the community*. Hundreds, if not thousands of articles have been written on the American jury system, including empirical studies of the representativeness of state and federal jury pools.[25] In

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[24] Some states have ruled that a trial court itself may raise a jury-related issue sue sponte to protect the rights secured by the 14th Amendment's Equal Protection Clause. See e.g., *State v. Evans*, 100 Wn App. 757, 765-767, 998 P.2d 373 (2000) (Batson issue); *Commonwealth v. Carson*, 559 Pa 460, 476-479, 741 A.2d 686 (1999) (same); *Brogden v. State*, 102 Md App 423, 430-432, 649 A.2d 1196 (1994) (same); *Lemley v. State*, 599 So. 2d 64, 69 (Ala App. 1992) (same).

[25] Plaintiffs have provided the Court with a comprehensive list of published empirical studies performed on Oregon jury pools, including the only study publicly supported by this Court which occurred back in 1993. Across the nation, academics and others are

Oregon state courts, a juror's role includes returning verdicts in civil cases, returning indictments, determining culpability in criminal cases, deciding facts relevant to criminal sentences, and making the momentous decision as to whether another human being should be sentenced to death for aggravated murder.

Whereas state court litigants have third party standing to raise and vindicate the rights of prospective jurors (*see e.g., Powers v. Ohio,* 499 U.S. 400 (1991); *Taylor v. Louisiana,* 419 U.S. 522 (1975); *Campbell v. Louisiana,* 523 US 392, 140 L Ed 2d 551, 118 S Ct 1419 (1998)), and to raise and vindicate the rights of the community as those rights relate to a fair justice system (*see e.g., Smith v. Texas,* 311 U.S. 128, 85 L Ed 84, 61 S Ct 164 (1940); *Batson v. Kentucky,* 476 U.S. 79, 90 LEd 2d 69, 106 S Ct 1712 (1986); *Johnson v. California,__ US __,* 162 L Ed 2d 129, 125 S Ct 2410 (2005)), litigants have no duty to do so.

THE EFFECT OF THE COURT'S DECISION

The Court's opinion in this case has effectively sealed the state court jury lists from public view, and effectively bars the vindication of the jury-service related rights that have been guaranteed to prospective jurors, litigants, and the community by Oregon and federal law. Under this Court's decision, no prospective juror has a right to view the state court source list, master list or term list, in an effort to assure him or herself that state court jury list compilation, and jury selection therefrom, is occurring according to law. No prospective juror has the

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constantly researching and writing about jury systems, jury behavior, and related topics. See e.g., Andrew J. Lievense, *Fair Representation on Juries in the Eastern District of Michigan: Analyzing Past Efforts and Recommending Future Action*, 38 U. Mich. J.L. Reform 941 (2005).

opportunity to detect errors in the jury lists and by doing so, vindicate their rights to be offered a fair and nondiscriminatory opportunity for state court jury service.

Under this Court's decision, no member of the community has a right to view the state court source list, master list or term list, in an effort to assure him or herself that state court jury list compilation, and jury selection therefrom, is occurring according to law. No community member or group has the opportunity to detect errors in the jury system and vindicate the community's rights to a fair and impartial jury system.

Under this Court's decision, no state court litigant has a stand-alone right to view the state court source list, master list or term list, in an effort to assure him or herself that state court jury list compilation, and jury selection therefrom, is occurring according to law. No state court litigant has the opportunity to detect errors in the jury system and vindicate his or her rights to a jury drawn from a fair cross-section and free of discrimination by court officials.

Under this Court's decision, the only persons allowed to view the jury lists are (I) Oregon Judicial Department employees and their agents, and (II) state court litigants who have (a) filed a qualifying motion challenging a state court jury pool, (b) filed an affidavit containing sufficient facts *already known* that support the filed challenge; and (c) filed a motion seeking access to the jury lists in order to physically acquire the lists *as evidence* to support the filed challenge. Under this Court's decision, the only way that a material departure from the law in Oregon state court jury list compilation will ever be detected, and rights pertaining thereto vindicated, is under two highly unlikely scenarios.

1. If an Oregon Judicial Department employee or agent publicly admits a recent error in the compilation of the state court jury lists, rights belonging to prospective

jurors, litigants, and the community will (arguably) be capable of being vindicated.

2. The only other way is if a particular "eligible" state court litigant – one who has been indicted by a grand jury or who is facing a petit jury:

(a) somehow (but without viewing the jury lists) becomes aware of sufficient facts to merit a challenge to a particular jury pool,

(b) files a qualifying challenge to a particular jury or the jury system;

(b) files an affidavit setting forth sufficient facts to support that challenge;

(c) files a separate motion seeking access to the jury lists as relevant evidence to support that challenge,

(d) receives the jury lists,

(e) inspects the jury lists,

(f) uncovers an irregularity in the lists,

(g) raises a new, additional challenge based on that irregularity, and

(h) zealously and successfully litigates that list-related challenge, and in doing so vindicates the rights of prospective jurors, the community and other affected litigants.

Beyond effectively blocking the vindication of existing state and federal jury-related rights, the Court's decision also indirectly limits speech about:

(a) the Oregon Judicial Department's compliance with the laws of jury list compilation and juror summoning and selection;

(b) the cross-section representativeness of Oregon jury lists

The Court's decision also directly blocks "outside" empirical research about:

(a) the Oregon Judicial Department's compliance with the laws of jury list compilation and juror summoning and selection;

(b) the cross-section representativeness of Oregon jury lists.

PLAINTIFFS' BASIS FOR SEEKING RECONSIDERATION

I. Plaintiffs Seek Clarification as to Whether the Court Has Considered Plaintiffs' Claims Under the Ninth and Fourteenth Amendments to the U.S. Constitution

Defendants sought review only from the Court of Appeals' decision regarding Plaintiffs' First Amendment claim. But after granting the Defendants' petition for review, this Court requested briefing on *all* of the issues that were raised by the parties before the Court of Appeals, stating that "the Court intends to consider on review whether defendants violated any pertinent state statute, including Oregon's Public Records Law, and any provision of the state or federal constitution, in addition to the First Amendment to the United States Constitution, in refusing to disclose source, master, and term lists of jurors." *Letter* dated Sept. 27, 2005 (ATT-8).

Relying on the U.S. Constitution, Plaintiffs have raised and preserved a Ninth Amendment claim and two Fourteenth Amendment claims (equal protection and due process). Although the trial court summarily denied these claims without analysis or discussion, Plaintiffs' record in raising and arguing these claims is clear.

The Court of Appeals did not reach the merits of the Ninth or Fourteenth Amendment claims, after deciding in Plaintiffs' favor under the First Amendment. As pointed out by Plaintiffs in their brief on the merits to this Court (at page 16), Defendants have *never* offered any argument

rebutting or opposing Plaintiffs' claims under the Ninth and Fourteenth Amendments. Given the procedural posture of *this* litigation, the Court may wish to take this opportunity to inquire of the Defendants' exactly what their position is on these federal claims (their position has not yet been clearly made of record). If the Defendants' do not wish to defend against these claims, Plaintiffs respectfully submit that Plaintiffs should be granted relief on these federal claims.

Plaintiffs' 14th Amendment claims may be unpersuasive to the Oregon state bench, but they are not frivolous. In denying Plaintiffs' First Amendment claim, this Court cited to *Los Angeles Police Department v. United Reporting Publishing Corp.*, 528 U.S. 32 (1991). As pointed out by Plaintiffs in their Reply Brief, Court of Appeals, page 7 n 14, that case was subsequently remanded back to the trial court for further proceedings on the URPC's 14th Amendment equal protection claim (see *URPC v. California Highway Patrol,* 231 F.3d 483, 484 (2000)). Plaintiffs here have raised a similar 14th Amendment equal protection claim, yet no Oregon state court – not the trial court, the Court of Appeals or this Court -- have deigned to explore or explain (even summarily) why Plaintiffs' 14th Amendment equal protection claim fails.

In its opinion, this Court twice provided the reader with a list of claims raised by Plaintiffs (opinion at ATT 1-7; see ATT-3 ¶1; ¶4. Because that list is not factually complete, it is not clear to Plaintiffs whether the Court has actually considered Plaintiffs' claims under the 9th and 14th Amendments. If the Court has considered and rejected these claims, Plaintiffs respectfully seek clarification of this fact within the Court's opinion. If the Court has not yet considered these claims, Plaintiffs petition the Court for reconsideration of the case and respectfully request that the Court consider the merits of

these claims. Similar claims in other cases are now pending before the Court.[26]

Alternatively, Plaintiffs would not oppose the Court remanding the case back to the Court of Appeals to allow that court to reach the merits of Plaintiffs' claims under the Ninth and Fourteenth Amendments to the U.S. Constitution.

A. A Summary of Plaintiffs' 14th Amendment Equal Protection Claim.

For purposes of convenience, Plaintiffs' 14th Amendment equal protection claim is summarized here.[27] Currently two classes of persons (Classes I and II) may obtain access to the state court jury records. Class I consists of persons who are State of Oregon employees and agents who compile the state court jury lists. Class II consists of state court litigants who have filed a qualifying challenge to a state court grand or petit jury pool and who have additionally filed a motion for access to the jury lists in order to procure the lists as evidence to support their

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[26] The Court has pending before it two petitions for mandamus filed by criminal defendants in state court seeking access to state court jury records in order to determine whether they have a basis for a challenge to the jury system, and who have raised claims to access the jury records under the 14th Amendment equal protection and due process clauses. *State v. Krueger, SC S53148* (Order dated 2/14/06 holding petition in abeyance at ATT-9) (Mr. Krueger is facing the death penalty) and *State v. Lueb, SC S53165* (Order dated 2/14/06 holding petition in abeyance) (Mr. Lueb is a co-defendant in a death penalty case, although he is not facing the death penalty).

[27] Plaintiffs incorporate the record and their previous briefing and argument in support of their federal claims under the Ninth Amendment and Fourteenth Amendments.

pre-existing jury challenge (thus, this class qualifies for access to the jury lists under ORS 10.275, ORS 136.005 or ORCP 57A). Class III is everyone else (including Plaintiffs). Persons in Class II are already litigants in state court, and are subject to the jurisdiction of the trial court, and therefore the court may issue a protective order over Plaintiffs' use of the jury lists. Plaintiffs in this case seek court-supervised access to the state court jury lists in order to inspect the state's compilation of the jury lists because of (A) a personal interest[28] and/or a public interest[29]. Plaintiffs are already subject to the jurisdiction

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[28] Plaintiff Shannon asserted that he was a prospective Multnomah County juror and interested in studying the jury system; Plaintiff Langley was preparing his defense for a death penalty sentencing jury trial and attempting to gain access to the lists in order to determine whether there was a material error in list compilation such that he should challenge the jury pool on behalf of himself or prospective Marion County jurors. A Marion County jury has since sentenced Mr. Langley to death, and his case is now on automatic appeal, State v. Langley, SC S53206. Plaintiff JSRC is a nonprofit organization seeking to continue its audit of the Lincoln County jury system for the public's benefit.

[29] Plaintiff JSRC had begun an audit of the Lincoln County Circuit Court jury system and uncovered the fact that a court employee was purposefully excluding prospective jurors over the age of 70, despite the fact that these prospective jurors had a right to be summoned and to serve on state court juries, and had been included on the Circuit court's source, master and term jury lists. Once the practice came to the attention of the local Presiding Judge, the practice was halted, and persons over the age of 70 were (reportedly) again summoned for state court jury duty in Lincoln County. The media covered the story. See e.g., MATT SABO, PEOPLE OVER 70 LEFT OUT OF JURY POOL THE OREGONIAN, APR. 27, 2002,

of the trial court, or have agreed to subject themselves to the jurisdiction of the trial court, and they have agreed to obey any court protective order issued by the court pertaining to their redisclosure of the jury lists. Plaintiffs have argued that there is no rational basis for not giving them access to the jury lists, where the state makes the lists available to those in Class II (litigants who already have sufficient facts to challenge the jury pool, have filed the challenge, and require the lists as evidence to support that challenge). This is quite similar to the scenario that the U.S. Supreme Court discussed, and which unfolded, in the *LAPD* case, and the circumstance that prompted the Ninth Circuit Court of Appeals to remand that case to the trial level for further proceedings.[30]

B. A Summary of Plaintiffs' 14th Amendment due process claim.

Oregon law mandates that jury lists be compiled and archived a certain way, and that voir dire panels be randomly drawn from a fair cross section of the community. Oregon law prohibits discrimination against individual jurors on a variety of bases. Following a series of pre-trial requests for access to jury lists by state court defendants in death penalty cases, and after several trial and appellate court rulings granting these defendants access (see e.g., *State ex rel Click v. Brownhill*[31]), staff

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PG A1. Some of the press clippings are contained in the trial court record. JSRC sought access to the jury lists to continue their audit.

[30] Of course both the *Houchins* case and the *LAPD* case are distinguishable because those cases involved public access to Executive Branch property (jail facilities (*Houchins v. KQED, Inc., 438 US 1 (1978)*); police arrest records (*LAPD v. URPC, 528 U.S. 32 (1999)*).

[31] *State ex rel Click v. Brownhill*, 331 Or 500, 15 P3d 990 (2002).

from the Oregon Judicial Department's State Court Administrator's Office lobbied the state legislature to curtail public access to the (unsealed) state court jury lists, and in 2001 the legislature did so. Since that time, Plaintiffs and other members of the public (including prospective jurors and state court litigants), have been denied due process of law under the 14th Amendment, because they have no meaningful opportunity to vindicate their statutory and constitutional rights pertaining to state court jury service as it relates to public jury trials. A right presupposes an opportunity to vindicate that right. See *Smith v. Texas,* 311 US 128, 130 (1940); *Carter v. Jury Comm'n of Green County*, 396 U.S. 320, 329-330 (1970); *Test v. United States*, 420 U.S. 28 (1975); *Campbell v. Louisiana*, 523 U.S. 392 (1998); *Johnson v. California*, __ US __ (2005). As stated by one Oregon trial court judge:

> Until the parties know how the process was done, how can they know if it was done properly? There is no need here to show that anyone intentionally manipulated the jury lists. I'm sure that the authorities in *U.S. v. Osorio* (801 Fed Supp 966, 972-973 (D. Conn 1992)) acted honestly in preparing their master list, but they left out two entire minority communities when the list was programmed. Such an honest mistake is possible and would seriously compromise the local jury pool. Only if the defense is entitled to verify the source lists, the master list and the term lists, can any defendant know that the process was done properly. *Surely the government's interest must be not only in providing a fair process, but also in openly allowing the public to determine that the process is fair.* Such a double check is not burdensome to the administration. This court is mindful that these are confidential records, as are many records that the court turns over to attorneys, but feels that the limitations placed in this order are a fair balance between the rights of

> jurors and those of the defendant. *** With the lists and procedures specified above, the defense will be able to evaluate the process used to draw the actual jury pool.*** "[32]

II. Plaintiffs Seek Reconsideration of the Court's Two Core Conclusions Pertaining to the "Experience and Logic" Test under the First Amendment.

A. The Court's holding that "there is no historical support for the kind of openness that plaintiffs demand."

This Court has denied Plaintiffs' First Amendment claim in part by concluding that "we know of no authority that permitted members of the public to scrutinize any preliminary or tentative [jury] lists that may have led to the final one. Certainly, there is no historical support for the kind of openness that plaintiffs demand."

The Court's "own analysis" of the historical record appears to hinge on a search for a discussion of access to "preliminary or tentative jury lists." These are terms that the Court has coined in an effort to adjudicate this dispute, which revolves around court-supervised public access to computerized jury lists including "preliminary or tentative jury lists" (e.g., the foundational data bases and the refined source list) as well as the final lists (master and term lists).

The Court will not find any discussion of public access to computerized jury lists in Sir Hale's treatise, but surely that does not end the inquiry.[33] Importantly, the

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[32] See Order of Judge Bergman, Allowing Disclosure of Confidential Jury Records, *Multnomah Co. Case No. 0102-31271, State v. Farmer, Nov. 26, 2001* (emphasis added).

[33] As the court acknowledges, prior to the use of computers, the names of prospective jurors were generally

Court has pointed to nothing in Sir Hale's treatise from which a reader could conclude that any of the jury lists *required to be compiled* at common law were cloaked in secrecy, such that prospective jurors or interested members of the community (including advocacy groups, scholars, criminal defendants, civil litigants, their counsel, or other such interested persons) could *not* inspect the jury lists. Indeed, the Court goes on to point out that in the nineteenth century the "prepared" jury list was "transmitted to the clerk of the county, or circuit court, where it [was] filed..." The Court does not insist that this "prepared" jury list -- filed with the county clerk or circuit court – was either sealed or somehow (historically) *not* open to the public. Nor has the Court distinguished this "prepared" list (as referred to by Thompson & Merriam) from the "prepared" lists at issue in this case, however "preliminary" or "temporary" the lists may be under the Court's current record retention schedule. Three types of jury lists are mandated by Oregon statute to be "prepared" for each jurisdiction: the annual source list, the annual master list, and the term lists. They are "prepared" at the direction of legislative mandates, albeit with the help of computers, computer programs, and a variety of state employees, including employees of the Oregon Department of Transportation, county and state elections clerks, and the Oregon Judicial Department.

The need for the public to access what the court has called "preliminary or tentative lists" (a portion of the

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drawn out of a closed box in open court, and once identified, the sheriff would go get those persons and bring them to the courtroom. Today, generally speaking, the names of prospective jurors are chosen at random by a computer program, which then addresses and prints out a jury summons to be mailed to that person. If the prospective juror receives the summons, there is typically no penalty enforced for ignoring it.

lists at issue in this case) has come about relatively recently, as the courts across the nation turned to the use of computers to create, store and manipulate the lists of prospective jurors, and – spurning the sheriff renowned talents -- switched to mailing out jury summons to prospective jurors, and as the country embraced and demanded a more diverse and inclusive jury pool.

Courts and counties now use computers to merge foundational data bases (e.g., lists of drivers and voters) into a primary jury source list, to delete duplicate names from that source list, and to then make smaller lists from the source list by randomly selecting names from the source list. Once courts began to rely on the computerized jury lists, it was only a matter of time before errors in computer programming produced errors in the compilation of the jury lists. It is a matter of public record that errors in computer programming have resulted in the deletion of thousands of otherwise eligible jurors from state court jury lists, thus violating the rights of litigants and prospective jurors alike. See e.g., *U.S. v. Osorio*, 801 F Supp 966 (1992), *U.S. v. Jackman*, 46 F3d 1240 (2nd Cir. Conn. 1995); *Lewis v. State*, 332 Md 639, 632 A2d 1175 (1993); *Azania v. State*, 778 NE2d 1253 (Ind. 2002); *SER Schrunk v. Walker et al*, 308 Or 398, 780 P2d 731 (1989) (challenge to Mult. Co. master list compilation).

As the Court of Appeals grasped, errors made in compiling the larger jury source list will be carried through to ('infect') the smaller master jury list and the term lists. But even if the computer programming is fine, the use of computers has not lessened opportunities for jury-list "clerks" to non-randomly remove or add persons to a jury list (such as occurred in Lincoln County). A case (or voir dire) panel that was not randomly drawn from a proper list; a voir dire panel that includes prospective jurors whose names are not found on the master, source or term list, or otherwise authorized to be included; and a voir dire panel that is randomly drawn from a materially bad source or master list, are examples of situations in

which there has been a material departure from the law with regards to the compilation of state court jury lists.

Given *this* historical context (going back at least to the mid-1980s), there *is* evidence that jury lists -- whether titled "preliminary" "tentative" or "final" have been open to public inspection. At the "national" level, the most obvious record is the passage in the mid-1960s by Congress of the Federal Jury Selection and Service Act) (28 USCA §§1861 et seq) setting forth how the jury lists are to be compiled, where the lists are to be maintained, how the lists are to be archived, and mandating court-supervised public access to the jury lists. Congress passed this legislation at the urging of the US Attorney General, as part of the Civil Rights Act.[34] During the hearings on the federal bill, Congressional witnesses and committee members explained the critical importance of litigants' ability to access court jury records for investigatory purposes; and how many courts had successfully hindered the inspection efforts of litigants, members of the public, and even the efforts of federal civil rights law enforcement agents. *States evaded inspections by relying upon lax state jury recordkeeping rules and heightened jury record confidentiality provisions.* Both the 1966 and the 1967 Civil Rights Acts contained provisions that would have forced States to comply with federally mandated public access and recordkeeping provisions, similar to those now found in both the Federal Jury Selection and Service Act,[35] and the Uniform Jury Selection Act.[36] In support of

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[34] Title I of the proposed 1966 and 1967 Civil Rights Acts were aimed at improving the federal court jury system and culminated in the passage of the 1968 Federal Jury Selection and Service Act, discussed *infra*. Title II of these proposed Acts sought to impose federal rules for jury selection on state courts.

[35] Title II of the 1966 Civil Rights Act read in relevant part:

Sec. 201. Discrimination Prohibited. No citizen shall be excluded from service as grand or petit juror in any State court on account of race, color, religion, sex, national origin, or economic status. Sec. 202 Suits by the Attorney General *** Sec. 203 Appropriate Relief *** Sec. 204. Discovery of Evidence *** Sec. 205. Preservation and Inspection of Records. (a) The jury officials in all State courts shall preserve the records and papers prepared or obtained in the performance of their duties for four years after the completion of service by all persons whose consideration for service as jurors was the subject of such records and papers. *** (b) Any record or paper required by subsection (a) of this section to be preserved shall, upon demand in writing by the Attorney General or his representative directed to the person having custody, possession, or control of such record or paper, be made available for inspection, reproduction, and copying by the Attorney General or his representative. During such period of time as such records and papers are not available for public inspection under State law, unless otherwise ordered by a court of the United States, neither the Attorney General nor any employee of the Department of Justice, nor any other representative of the Attorney General, shall disclose the contents of any record or paper produced pursuant to this title except to Congress and any committee thereof, governmental agencies, and in the preparation and presentation of any case or proceeding before any court or grand jury. The United States district court for the district in which a record or paper so demanded is located, shall have jurisdiction by appropriate process to compel the production of such record or paper.
H.R. Report No. 1678, Part 1 [to accompany H.R. 14765], 89th Congress, 2d Session, Civil Rights Act of 1966, pg 7-8.

[36] *See* Vincent L. McKusick and Daniel E. Boxer, Uniform Jury Selection and Service Act, 8 Harv J on Legislation 280 (Nov. 1970):

In August, 1970, the National Conference of Commissioners on Uniform State Laws approved a Uniform Jury Selection and Service Act *** The Conference had undertaken this drafting after the House of Delegates of the American Bar Association had referred to it a resolution urging drafting of uniform jury legislation presented to the A.B.A. 1966 Annual Meeting by Judge Nathan J. Kaufmann of Detroit, Michigan, Michigan, 91 ABA Rep. 43-44 (1966) *** The uniform act, to a considerable extent modeled after the Federal Jury Selection and Service Act of 1968 [28 USC §§ 1861-69] clearly states its policy in Section 1: *** *that all persons selected for jury service shall be selected at random from a fair cross section of the population of the area served by the court, and that all qualified citizens shall have the opportunity in accordance with the provisions of the Act to be considered for jury service in this state and an obligation to serve as jurors when summoned for that purpose.* *** The need for improved methods of jury selection has been strongly pointed up by court decisions which have challenged as discriminatory both state and federal jury venires. The most recent Supreme Court case is *Carter v. Jury Commission of Greene County*, [396 US 320 (1970)] where the Court set down minimal constitutional guidelines for jury selection methods...In 1970, *Carter* was the first case to reach the Court in which the composition of a jury was attacked, not by a convicted criminal, but by plaintiffs, seeking affirmative relief ***. The *Carter* case involved a state jury selection method[.]

8 Harvard J on Legislation at 280-81 (1970).

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To the extent the Federal Constitution imposes a uniform Fourteenth Amendment standard upon state jury

selection, it is useful to the states to have uniform statutes satisfying that standard.

8 Harvard J on Legislation at 284 (1970).

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[The jury selection process], managed under court supervision *** commences with the compilation of a "master list." 8 Harvard J on Legislation at 285 (1970).

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Only the court determines whether prospective jurors are disqualified. Thus the uniform act keeps this delicate step in juror selection under the direct control of a judge. What at first consideration may seem merely an onerous task for already overburdened judges is in fact necessary in view of its importance.

8 Harvard J on Legislation at 288 (1970).

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Section 12 prescribes the means for challenging failure to comply with the act in selecting either a grand or petit jury. That section, derived from the federal act, is "designed to reduce the possibility that such challenges will be used for dilatory purposes." In the first place, only a substantial failure to comply with the act is subject to challenge. Since jury selection under the act is "a largely mechanical process in which the role of human discretion is minimized," it should be relatively easy to determine whether there has been any substantial departure from the specified procedures. Secondly, section 12(a) imposes a strict time limitation on motions challenging compliance with the act. A motion challenging the method of selection of either grand or petit jurors may be filed no later than the swearing in of the petit jury, and must be filed even earlier if the moving party knew, or should have known through reasonable diligence, of the grounds

the need for such federal intervention, and speaking in favor of Title II of the proposed 1967 Civil Rights Act, U.S. Attorney General Clark testified:

> [M]ost jury selection cases are *habeas corpus* proceedings.[37]
>
> > Elimination of discrimination in the selection of State juries is elemental to the administration of justice. The 14th amendment requires that the State court jury "be a body truly representative of the community," *Smith v. Texas*, 311 U.S. 128, 130 [(1940)]. Nearly a century after the amendment's adoption in 1869, and following scores of judicial findings of jury discrimination, State court juries still do not represent a fair cross section of the community in some parts of the country. *** Although the most flagrant abuses have involved systematic exclusion of Negroes, discrimination or

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thereof. Finally, by section 12(b), only a motion supported by an affidavit making out a prima facie case of substantial noncompliance with the act will be entertained by the court. Section 12 itself declares that its procedures are the exclusive means of challenging the selection of the jury on the grounds of nonconformity with the act. Without mention in the act itself, it is equally clear, as the Commissioners' comment indicates, that enforcement of rights created by the Constitution and by other laws are not subject to the uniform act's procedural limitations. However, any jury challenge, no matter how it is phrased, which in substance constitutes a claim of substantial failure to comply with the uniform act, should be subject to the limitations of section 12.
8 Harvard J on Legislation at 289-90 (1970).

[37] Civil Rights Act of 1967, Hearings before the Subcommittee on Constitutional rights on S.1026 *** Proposed Civil Rights Act of 1967, SUDOC Y4.J89/2: C49/13/967, Testimony of U.S. Attorney General Clark, pg 89.

underrepresentation on State juries because of sex and economic status are also serious current problems. Mississippi law excludes women from juries altogether. Louisiana and New Hampshire use women jurors only when they volunteer to serve. Twelve States grant women an absolute right to be excused from jury service, whether or not they have responsibilities that would make jury service particularly onerous. The laws of several States impose direct economic qualifications for jury service. *** In other States, the jury laws may operate indirectly to exclude persons of low income by specifying an economically biased source, like the tax rolls, as the exclusive source of jurors. Even where the jury selection laws are on their face neutral, the practices of jury officials may result in keeping qualified persons off juries. In a recent case the State jury officials, without statutory authority, avoided calling daily wage earners on the assumption that most of them would be excused by the court on hardship grounds. The Federal appellate court held that: "The exclusion of daily wage earners as a class violates the petitioner's due process and equal protection rights to an impartial jury representing a cross section of the community." *Labat v. Bennett*, 365 F.2d 698, 719-720 (C.A.5, 1966). Present remedies for enforcement of the 14th amendment in State jury selection are grossly inadequate. *** [T]he evidence to support the claim – primarily, the records of the jury commission – may be inaccessible or insufficient to permit a definite determination. The Supreme Court of North Carolina, in reversing a criminal conviction because of race discrimination in jury selection, noted that – "Copies of jury lists, showing the names included and those excluded, were not kept; when a new jury list was made the old one was

destroyed. The judge would not permit an examination of the current jury box, or a determination of its racial composition." *State v. Lowry*, 263 N.C. 536, 548, 139 S.E. 2d 870 (1965). When claims of racial exclusion by criminal defendants are sustained, the rulings frequently have no permanent effect. Thus, in *Whitus v. Georgia*, 385 U.S. 545, [(1967)] the Supreme Court reversed a criminal conviction where the defendants had twice been indicted and tried by juries selected in a racially discriminatory manner. Present law does not authorize the Federal Government to initiate civil proceedings against State jury officials engaged in discriminatory selection practices. Under Title IX of the 1964 Civil Rights Act, the Department of Justice may intervene in jury discrimination civil cases brought by private individuals. But the Federal Government cannot act until a private suit is filed. *Expense, lack of counsel, and intimidation or fear of reprisal, deter such private suits.* Title II would afford effective remedies for eliminating invidious discrimination in State jury selection procedures. It contains four basic provisions *** Third, it established a procedure for disclosure and development of information relevant to the determination of whether State jury officials have engaged in discriminatory practices. *** Fourth, it requires State jury officials to preserve for four years all records used in the performance of their duties. [38]

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[38] Civil Rights Act of 1967, Hearings before the Subcommittee on Constitutional rights on S.1026 *** Proposed Civil Rights Act of 1967, SUDOC Y4.J89/2: C49/13/967, Testimony of U.S. Attorney General Clark, pg 74-75 (emphasis added).

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[T]here has been discrimination in selection of jurors in a number of jurisdictions, a great number of jurisdictions, in parts of this country for many, many years; that efforts through litigation [under existing laws such as the 14th Amendment and 18 USC §254] and otherwise to eliminate that discrimination in this most essential right, if you are ever on trial for life, liberty, or property, that this litigation, this activity here, heretofore have not been adequate[.] *** I would that as far as purposeful discrimination is concerned, knowing discrimination even, that most parts of the country haven't engaged in it. I think that we have been careless and negligent generally about our jury selection policies. I think we have let it grow with the system and we haven't examined it diligently, so that by and large we need to examine that just as we need to examine Federal jury selection right now.[39]

[A]s envisaged under this legislation, we will be able to show and in large measure because we have investigatory resources, and because of the recordkeeping requirements—what has gone on over a period of time. The difficulty in [proving] the [wrongful] individual exclusion is that whether it was a woman or a Negro [excluded] or whoever it might have been, you cannot prove what the selector intended at that time when the exclusion was made. *** This [prima facie case] is based upon what an individual [selection official] does,

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[39] *Id*, pgs 87-88 (reference to pre-existing laws found at pg 67, Sen. Ervin).

and the way you prove it is by what he has done over a period of time, as a practical matter.[40]

[W]e feel that the right to jury service is an invaluable right and a discrimination again not to be tolerated. *** We have been able to make jury cases at great effort in civil situations where we have been able to get into the case because some private person has been injured and has brought a case and has sought our help, and it requires a tremendous volume of evidence and research and study, and we will not be able to assure the people of this country that they will have fair jury selection without a much more efficient procedure[.][41]

If an individual who is responsible for jury selection under a particular State system, whether it be a jury commissioner, a judge, or the attorneys in the trial of the case would decide in his own mind to challenge a person on the basis of character every time he happened to be a Negro or every time she happened to be a woman, there would be only one way to reach that abuse that we have found. That is the way.[42]

As our experience shows, the great difficulty that defendants and petitioners and others described here have in proving their case is their inability to secure the facts regarding the procedure and practices of officials who are responsible for

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[40] *Id.*, pg 101.

[41] *Id.* pg 102.

[42] *Id.* pg 104.

> selection of the jury by which they have been or will be tried. This provision is necessary to obtain that evidence from the people who have it, the people who have performed the acts. As a practical matter, these are things that the people responsible in the judicial administration of the system should have at their fingertips anyway and which they should be prepared to certify to without much thought. This is so because they need to know that much about how they have proceeded and they need to be able to demonstrate to any member of the public, including any defendant, petitioner, or other person prescribed, how they go about it.[43]

> The [preserved] record gives the basis for determination, and that is the reason that cases cannot be successfully brought now. You cannot go back and recreate jury selection in the county for the years preceding a given date when the issue arises because the records are lost and the people are gone and nobody recalls. You need the records. *** [You] have got to show more than one swallow to make a summer. *** These can be raised by diligent lawyers on behalf of their clients. They can be raised on the basis of the record that then exists.[44]

The Hon. Emanuel Celler, member of the Committee on the Judiciary on H.R. 14765 stated:

> The provisions of [Title II] section 204 are designed to remove major obstacles to effective enforcement

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[43] *Id.*, p. 105. The 1967 version of Title II contained various procedure rules.

[44] *Id.*, at 111.

of the requirement of nondiscrimination in jury selection – the inability of complainants to ascertain how jury selection actually operated (due largely to the inaccessibility of official jury records), and the unfairness of requiring litigants to meet a burden [on the merits] greater than a showing of probable cause, where the jury records do not permit a determination of the issue. Section 204 would permit the court which considers a jury exclusion claim to base its decision on a complete record of the questioned events and require the State to assume the burden of disproving that discrimination occurred. Where the States have not met their responsibilities to safeguard Federal constitutional rights in State court proceedings, section 5 of the 14th Amendment imposes an affirmative obligation on the Congress to provide appropriate safeguards for these rights. Even without implementing legislation, the due process and equal protection clauses of the 14th amendment control many aspects of local procedure. *** Invidious discriminations in State court juries is not a regional problem. Although such discrimination with respect to Negroes and women is most aggravated in certain areas of the South, unconstitutional discrimination in jury selection is by no means confined to those areas. Certain State laws and local jury selection procedures have the effect of excluding substantial members of otherwise qualified persons from jury service because of economic status.[45]

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[45] H.R. Report No. 1678 Part 2 [to accompany H.R. 14765], 89th Congress, 2d Session, Civil Rights Act of 1966, Additional and Minority Views, Additional Views of Hon. Emanuel Celler, pg 9-10.

Other members of the Congress added support for the measure.[46] However, due in large part to concerns about "states' rights," Title II (in any of its proposed versions) failed to pass into federal law.[47] Notwithstanding Title II's failure to pass, public awareness of the problem as well as support by national bar committees and the U.S. Attorney's Office, led to the drafting of the Uniform Jury Selection and Service Act (UJSSA), now in use by many states.[48] Oregon's statutory

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[46] See, Additional Views of Hon. William M McCulloch and Hon. Charles McC. Mathias, Jr., *Id.*, at 17-18; Additional Views of Hon. Richard H. Poff and Hon. William C. Cramer, *Id.*, at 21; Additional Views of Hon. John Conyers, Jr., Hon. Don Edwards, Hon. Jacob H. Gilbert, and Hon. Robert W. Kastenmeier, *Id.*, at 36.

[47] See, Minority Views of Hon. William M. Tuck, *Id.*, at 46 (Title II constitutes another of a long list of flagrant encroachments upon the rights of the States. I consider this title in violation of the Constitution); see also, Minority Views of Hon. Robert T. Ashmore, Hon. William M. Tuck, and Hon. John Dowdy, *Id.*, at 50.

See also: Subcommittee on Constitutional Rights, Hearings before the Subcommittee on Constitutional rights on S.1026 *** Proposed Civil Rights Act of 1967, SUDOC Y4.J89/2: C49/13/967, Statement of Hon. Sam H. Ervin, Jr., Chairman, "[With Title II], we are faced not only with problems involving basic elements of the administration of State justice, but also with fundamental issues which go to the heart of the Federal system *** There is simply no constitutional basis for Title II."

[48] See Vincent L. McKusick and Daniel e. Boxer, UNIFORM JURY SELECTION AND SERVICE ACT, 8 HARVARD J ON LEGISLATION, 280 (Nov 1970):

Section 12 prescribes the means for challenging failure to comply with the act in selecting either a grand or petit jury. That section, derived from the federal act, is "designed to reduce the possibility that such challenges will be used for dilatory purposes [citing to S. Rep. No. 91, 90th Cong., 1st Sess. 33 (1967)]. In the first place, only a substantial failure to comply with the act is subject to challenge. Since jury selection under the act is 'a largely mechanical process in which the role of human discretion is minimized,"[Id. at 34] it should be relatively easy to determine whether there has been any substantial departure from the specified procedures. Secondly, section 12(a) imposes a strict time limitation on motions challenging compliance with the act. A motion challenging the method of selection of either grand or petit jurors may be filed no later than the swearing in of the petit jury, and must be filed even earlier if the moving party know, or should have known through reasonable diligence, of the grounds therefor. Finally, by section 12(b), only a motion supported by an affidavit making out a prima facie case of substantial noncompliance with the act will be entertained by the court. Section 12 itself declares that its procedures are the exclusive means of challenging the selection of the jury on the grounds of nonconformity with the act. Without mention in the act itself, it is equally clear, as the Commissioners' comment indicates, that enforcement of rights created by the Constitution and by other laws are not subject to the uniform act's procedural limitations. However, any jury challenge, no matter how it is phrased, which in substance constitutes a claim of substantial failure to comply with the uniform act, should be subject to the limitations of section 12.

scheme governing jury selection was amended in the mid-1970s and modeled upon the Uniform Jury Selection and Service Act.[49]

With regard to this practices of state and county courts across the nation in the last 225 years, Plaintiffs agree that there is no readily available treatise setting

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8 HARVARD J ON LEGISLATION, 280, 289-290.

> Section 5. *** Comment.***The master list is open to the public. In general other lists and papers used or produced in connection with the jury selection process, with the exception of the names of jurors drawn for jury service and the contents of their juror qualification forms (Section 9), are kept confidential, but even they can be opened up for examination by parties preparing, presenting or defending against motions for relief on the ground of a substantial failure to comply with this Act. ***

[49] See Council on Court Procedures, Legislative History relating to Promulgation of Oregon Rules of Civil Procedure (1/1/78 through 12/31/78) Vol 6 of 7. In relevant part:

Comment: Section 57A. allows a challenge to jury selection procedures. It is not the common law challenge to the array but a specific method of insisting upon compliance with jury selection procedures before trial. It was taken from Section 12 of the Uniform Jury Selection Act. The procedure is limited to questioning validity of jury selection methods. Any defect must be "substantial", and the court can refuse to stay proceedings when only a technical defect is involved.

Council on Court Procedures, Legislative History (1978) Vol 6 of 7, pgs 165, 166, 172, available from the State of Oregon Archives.

forth whether or how the public could access each and every jury list. But Oregon certainly required the jury lists to be filed with the Court (a practice dating back at least to 1892), and there was no indication that the lists were to be sealed before or after being filed. Plaintiffs acknowledge that in the mid-1950s, the Congressional record reflects that certain states were denying public access to their jury lists, and refusing access even to Assistant U.S. attorneys who were investigating civil rights complaints related to discriminatory jury selection practices. But on the other hand, various states have explained in published opinions that *because* the jury lists are open to inspection, the evidentiary burden and time restrictions imposed on a defendant who wishes to challenge the jury pool is reasonable.[50]

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[50]Irregularities in the selection of prospective jurors by the jury commissioners are waived by accepting the jurors on the trial of a case, *where an examination of the records in the clerk's office would have disclosed the facts* in time to have interposed objections by a plea in abatement. *Fenwick v. State*, 197 Ind. 572, 150 NE 764 (1926).

*Where *the public records in the clerk's office would not disclose irregularities in the drawing of the jury, defendant did not waive such irregularities* by accepting the jurors on the trial of the case. *Cross v. State*, 272 Ind. 223, 397 NE2d 265 (1979).

**Richardson v. Louisville & NRR*, 291 Ky 357, 164 SW 2d 602 (1942) (jury lists are public records so that failure of jury commissioners to select jurors from right list could have been discovered before trial by exercise of due diligence...)

*The law prescribing the mode of drawing juries directed that a list of jurors drawn for each term should be filed in the clerk's office as soon as completed, subject to the inspection of any person who may desire to examine it, in

This historical record supports an inference that at the state level, some states – if not most -- did provide and continue to provide for public access to jury records, including the jury lists.

Based on the foregoing, Plaintiffs seek reconsideration of the Court's ruling on their First Amendment claim.

B. This Court has denied Plaintiffs' First Amendment claim in part by concluding that "the selection of names for the list of prospective jurors...is one or more (sometimes several) steps removed from the trial itself.... Unlike [public access to] actual trials, public access plays no significant role in the official and largely rote function of collecting and winnowing names for jury lists."

The Court's conclusion that "public access plays no significant role in the official and largely rote function of collecting and winnowing names for jury lists" appears to be based in part on a argument, that because Oregon jury lists are compiled ahead of trial and inside of a computer, they are *per se* beyond the reach of the First Amendment.

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order that any defects of informalities which may have occurred in the formation, drawing, or summoning of jurors, or any other defect whatsoever in the construction of the jury, should be made on the first day of the term. *State v. Vegas*, 19 La Ann 105 (1867).

*Statute which required objections to jury to be specified before entering on trial, applied only to matters with reference to which occasion and opportunity for objection arise before entering on trial. *Bradley v. Shreveport Gas, Electric Light & Power Co.*, 139 La. 1029, 72 So. 725 (1916).

Surely the public's First Amendment right to inspect the state court jury lists is not so delicate as to be inflexibly defined and corralled by the four corners of a given courtroom. It cannot be material under the First Amendment whether the computer used to compile the state court jury lists is physically located within a particular courtroom, or that the lists are drawn earlier than the day a particular trial begins. This is particularly so when the national public record reflects such an impressive and varied history of public and litigant interest in jury lists and jury systems. Indeed, prior to 2001, Oregon had a very strong track record of providing public and litigant access to jury records, and benefiting from it.

In 1985, State Court Administrator Linden testified to the Legislature that the master jury list *had* to be released if someone wanted to scientifically study it for representativeness.[51] Legislators who were members of the Oregon State Bar commented that they were used to going down to the clerk's office and reviewing the jury list before the empanelling of juries in cases.[52]

There have been many academic and in-house research projects conducted and published concerning

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[51] "[The] master list has to be available for examination. If someone, for example, wanted to scientifically test the representativeness of the jury pool, we would have to make available to them -- the list." *1985 House Bill 2985, House Judiciary Committee (Subcommittee 2), April 12, 1985, Tape 425 at 278.*

[52] The Honorable Mult. Co. Cir. Ct. Judge Robert Redding provided a detailed history of this session in his 22-page Order in *State v. Hurwitz*, Aug. 29, 2000, Case No. C9811-39654, Opinion and Order Denying Kingsley Click's and Douglas Bray's Motion to Quash Subpoena Duces Tecum Regarding Jury Records.

Oregon jury practices.[53] There have been a variety of additional Oregon jury study-related activities

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[53] Examples of the research from said studies include the following:

1) Questionnaire on Current Jury Selection Methods, published by Congress, Federal Jury Selection Act of 1967: Hearings on S. 383, S.384, S. 385, S. 386, S. 387, S. 989, S. 1319 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 90th Congress, 1st Session, FED. JURY SEL SUDOC Y4.J89/2:J97/10, pg 1123-1127 (survey includes answers provided by Mr. D. Sullivan, Clerk for the District Court of Oregon, stating he intentionally supplemented the Oregon federal source list with minorities, and publishing a copy of 1966 Oregon federal jury qualification questionnaire);

2) Bernard Grofman, MULTNOMAH COUNTY [OREGON] JURY PROJECT, 1973-1976, INTER-UNIVERSITY CONSORTIUM FOR POLITICAL AND SOCIAL RESEARCH, ICPSR 9030 (Summer 1984) (performed with cooperation of Multnomah Co. Circuit Court Judge Robert Jones and Michael Schrunk from the Mult. Co. D.A.'s office) The Multnomah County [Oregon] Jury Project, 1973-1976 was conducted by Bernard Grofman, University of California, Irvine. The data were collected as part of the Modeling Jury Decision Processes project funded by a grant from the National Science Foundation. *** These data represent a census of 32 jury panels which served in 1973 through March 1976 *** Records were obtained from the Fourth Circuit Court, Multnomah County (Portland), Oregon. Information collected includes: trial summaries (members of the jury, their votes, the final verdict, the type of case, the name of the judge, the amount of time taken by the jury to arrive at a decision), monthly juror panel summaries (age, occupation and years in residence in Oregon), and self-administered juror demographic data

sheets (e.g., educational background, spouse and children summaries, past jury and trial information). "[W]ith the kind assistance and utmost cooperation of Judge Robert Jones and Mr. Michael Schrunk (Office of the District Attorney, Multnomah County), I have been allowed to borrow original court records for the period 1969-1978 in order to be able to code and keypunch the data on them." The file contains 199 variables for 6,657 jurors and 1,159 trials[.] *MCOJP, Data Collection Description*, pg 11 (data set available at www.icpsr.umich.edu); "The [Fourth Circuit Court, Multnomah County (Portland), Oregon] Court is also distinctive in that it maintains records on how each juror had voted in each trial on which s/he had previously served and that this information (along with demographic information on prospective jurors) is available to attorneys preparing for voir dire[.] "*MCOJP Final Project Report S0C77-24702,* pg 100.

3) ADMINISTRATION OF THE JURY SYSTEM IN THE OREGON TRIAL COURTS IN APRIL 1984, State Court Administrator's Office, August 1984 (Oregon Judicial Dept., Salem, OR);

4) COMPARISON OF OREGON PRACTICES WITH ABA STANDARDS RELATING TO JUROR USE AND MANAGEMENT, State Court Administrator's Office, August 1984 (Oregon Judicial Dept., Salem, OR);

5) COMMENTS TO JURY BILL [1985] HB 2545. Prepared by Office of the State Court Administrator, May 1985, (submitted as Exhibit B to the Hearings on HB. 2545, Relating to Juries, Before the Senate Judiciary Comm., 1985 Leg. 63rd Sess. June 14, 1985, as part of the testimony of William Linden, Jr., State Court Administrator; detailing county-by-county jury practices, etc.);

6) COMPARISON OF MANUAL AND ELECTRONIC JURY SELECTION SYSTEMS, Prepared by Office of the State

Court Administrator, May 1985 (attached as Appendix A to Exhibit B, submitted to the Hearings on HB. 2545, Relating to Juries, Before the Senate Judiciary Comm., 1985 Leg. 63rd Sess. June 14, 1985, as part of the testimony of William Linden, Jr., State Court Administrator)(detailing the differences in electronic vs. manual jury list compilation methods then employed by the Oregon State Court Administrator's Office);

7) Bernard Grofman, Michael Migalski, Deborah Dunkel, JURY FOREMAN SELECTION: THE EFFECTS OF STATUS, GENDER, AND JURY COMPOSITION CONTEXT (Draft 5, 1987) (analysis of the "data base consisting of jury demographic and verdict information on 836 trials in the Circuit Court of Multnomah County (Portland, Oregon) for the period of 1973-1976," discussing gender and occupational status bias in the self-election of grand jury foremen in Multnomah Circuit Courts);

8) THE REPRESENTATIVENESS OF JURY POOLS AND TREATMENT OF JURORS IN THE MULTNOMAH COUNTY, OREGON, COURTS AUG, 1993 (available from the Multnomah County Bar Association, Portland, Oregon);

9) REPORT OF THE OREGON SUPREME COURT TASK FORCE ON RACIAL/ETHNIC ISSUES IN THE JUDICIAL SYSTEM, May 1994, Office of the State Court Administrator, Oregon Judicial Department (see: Chapter 7, Juries);

10) PROGRESS REPORT OF THE OREGON SUPREME COURT IMPLEMENTATION COMMITTEE, JANUARY 1996, Office of the State Court Administrator, Oregon Judicial Dept. (see Chapter Six, Minorities and Jury Service: The Goal: A Jury of One's Peers);

11) Frank Maiocco, Jr., Lore Joplin, AN EVALUATION OF THE MARION COUNTY COURT ONE TRIAL/ONE DAY JURY

undertaken by the bar, legislative and/or civic groups.[54] This effort is echoed across the nation, and Plaintiffs will

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TERM (Office of the State Court Administrator, Oregon Judicial Department, Salem, Oregon) (Feb. 27, 1997);

12) MARION COUNTY JUROR SATISFACTION ANALYSIS, MAY 20, 1999 (available from the Office of the State Court Administrator, Oregon Judicial Department, Salem, Oregon);

13) Grant Farr, PhD, REPORT ON EXAMINATION OF JURY MASTER [LIST] FOR WASHINGTON COUNTY [MARCH 2002], (submitted to Washington Co. Cir. Ct. 3/13/2002, *State v. Spencer*, C00-0928CR);

14) Rose Jade, VOTER REGISTRATION STATUS AS A JURY SERVICE EMPLOYMENT TEST: OREGON'S RETRACTED ENDORSEMENT FOLLOWING *BUCKLEY V. AMERICAN CONSTITUTIONAL LAW FOUNDATION*, 39 WILLAMETTE LAW REVIEW 557 (2003) (providing history of Oregon state court jury service eligibility and an empirical comparison of how using the driver registration lists in addition to the voter registration lists broadens the state's jury pools).

[54] See, for example:

The Court Jury Management Task Force described by former Oregon State Court Administrator William Linden, Jr., in his testimony to the 1985 Senate Judiciary Committee (Exhibit B pg 1, submitted to the *Hearings on H.B. 2545, Relating to Juries, Before the Senate Judiciary Comm., 1985 Leg. 63d Sess. June 14, 1985)*;

Philip Clifford's study of Multnomah County voter registration and racial composition by Multnomah County precinct, pertaining to the 1992 General Election, described by Mr. Norm Frink, Multnomah County Dep. District Attorney, during Mr. Frink's testimony, *Hearings*

provide the Court with a sampling of the national literature if the Court so requests.

Given this historical record, Plaintiffs seek clarification of the basis for the Court's conclusion that "public access plays no significant role in the official and largely rote function of collecting and winnowing names for jury lists." The Court did not cite to *any* authority for this core conclusion, and the merit of this conclusion is dwarfed by the public record reflecting a long, intensive tradition of legal, litigant, and scholarly attention being paid to the compilation of jury lists locally and nationally. Public access certainly played a significant role in the official and "largely rote" function of collecting and winnowing names for the Lincoln County jury lists, for it was only by public access that unlawful age discrimination in jury summoning was detected in Lincoln County. The public record reflects that the Lincoln County court itself was grateful that the error had been detected.[55] Plaintiffs are concerned as to what more this

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on S.B. 936, Relating to implementation of victims' rights initiative, Before the House Judiciary Comm., Subcommittee on Criminal Law, 1997 Leg. 69th Sess. Apr. 8, 1997, Tape 81A at 155, and portions of it submitted by Ms. Helen Smith for Mr. Frink on March 12, 1997 as Exhibit B to the Senate Judiciary Committee on Crime & Corrections) (copy of Mr. Clifford's study, as received by Rose Jade from Mr. Frink, on file with The Jury Service Resource Center); Oregon Criminal Defense Lawyers Association's OREGON POPULATION/JURY POOL/ARREST/CONVICTION COMPARISONS (1997), submitted as Exhibit D by Jim Arneson, *Hearings on S.B. 936, Relating to implementation of victims' rights initiative, Before the Senate Comm. on Crime & Corrections,* 1997 Leg. 69th Sess., Mar. 21, 1997.

[55] The Lincoln County bench voiced surprise that persons over 70 had been systematically culled out by the jury clerk, because they had been seeing – what they believed

Court could require Plaintiffs to demonstrate, in order to prove that public access plays a "significant role" in the compilation of jury lists.

CONCLUSION

For the foregoing reasons. Plaintiffs seek reconsideration and clarification of the Court's opinion.
DATED: May 6, 2006
Respectfully submitted
/signed Rose Jade, OSB 95310/

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to be – persons over 70 years of age on their juries. See Matt Sabo, *People over 70 left of out jury pool*, OREGONIAN, Apr. 27, 2002, at page A1.

Excerpts from Briefing: Excerpts from Attachments to Plaintiffs' Petition for Reconsideration (before the Oregon Supreme Court) filed May 2006

ATTACHMENT PAGE 9:

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON
Plaintiff-Adverse Party,

v.

Tracy Lynn Krueger
Defendant-Relator.

Multnomah County Circuit Court No. 040130314
SC S53148

ORDER HOLDING PETITION FOR ALTERNATIVE WRIT IN ABEYANCE AND GRANTING MOTION TO WAIVE THE FILINC FEE

Upon consideration by the Court.

The Supreme Court has considered the petition for alternative writ of mandamus in this case and decided that it should withhold final action on the petition until the court has decided Jury Service Resource Center v. Carson, 399 Or 405 (2005) IT IS SO ORDERED that the petition for review shall remain pending in the Supreme Court until further order of the court. *** Dated this 14th day of February 2006.

/signed by W. Michael Gillette, Presiding Justice/

ATTACHMENT PAGE 10:

IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON
Plaintiff-Adverse Party,

v.

STUWART EDWARD LUEB.
Defendant-Relator,
And
LYDIA MARIE WAY,
Defendant.

Multnomah County Circuit Court No. 041035541
SC S53165

AMENDED ORDER HOLDING PETITION FOR ALTERNATIVE WRIT IN ABEYANCE AND GRANTING MOTION TO WAIVE THE FILING FEE

Upon consideration by the Court.

The Supreme Court has considered the petition for alternative writ of mandamus in this case and decided that it should withhold final action on the petition until the court has decided *Jury Service Resource Center v. Carson*, 399 Or 405 (2005) IT IS SO ORDERED that the petition for review shall remain pending in the Supreme Court until further order of the court. *** Dated this 21th day of February 2006. *Nunc pro tunc* February 14, 2006.

/signed by W. Michael Gillette, Presiding Justice/

Text of Federal Constitutional and Statutory Provisions.

U.S. Const., amend. I provides in relevant part:

> "Congress shall make no law...abridging the freedom of speech or of the press[.]"

U.S. Const., amend. VI provides in relevant part:

> "In all criminal prosecutions the accused shall enjoy the right to *** trial by an impartial jury of the state and district wherein the crime shall have been committed."

U.S. Const., amend. IX provides in relevant part:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

U.S. Const., amend. XIV provides in relevant part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

18 U.S.C. §243 provides:

> "Exclusion of jurors on account of race or color. No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than $5,000."

Text of key sections of Oregon Revised Statutes and Oregon Rules of Civil Procedure.

ORS 10.215 states in relevant part:
(1) *** Except as specifically provided by law, the State Court Administrator and circuit courts may not disclose source lists obtained from private or public entities, and jury lists containing names selected from a source list, to any other person or public entity.

ORS 10.275 states in relevant part:
(1) A person challenging a jury panel under ORS 136.005 or ORCP 57A who seeks jury records that are confidential under ORS 10.215 must include a request for access to the confidential records in the motion challenging the jury panel. The motion and supporting affidavit must be served on the trial court administrator and the State Court Administrator. The request must: (a) Specify the purpose for which the jury records are sought; and (b) Identify with particularity the relevant jury records sought to be released including the type and time period of the records. (2) The court may order release of the jury records if the court finds that: (a) The jury records sought are likely to produce evidence relevant to the motion; and (b) Production of the jury records is not unduly burdensome.*** (5) The procedure established by this section is the exclusive means for compelling production of confidential jury records as evidence relevant to a challenge to a jury panel under ORS 136.005 or ORCP 57A.

ORS 136.005 provides: Challenge to jury panel.
(1) The district attorney or the defendant in a criminal action may challenge the jury panel on the ground that there has been a material departure from the requirements of the law governing selection of jurors by filing a motion with the court supported by an affidavit

alleging facts that, if true, constitute a material departure from the requirements of the law governing the selection of jurors. The party making the motion shall serve the motion and supporting affidavit on the other party, the trial court administrator and the State Court Administrator.
(2) A challenge to the panel shall be made before the voir dire examination of the jury.
(3) If the court determines that there has been a material departure from the requirements of the law governing selection of jurors, the court shall:
(a) Stay the proceedings pending the selection of a jury panel in conformity with the applicable provisions of law; and(b) Grant such other relief as may be appropriate.
(4) The procedures prescribed by this section are the exclusive means by which a district attorney or defendant may challenge a jury panel.

ORCP Rule 57A. Challenging compliance with selection procedures.
(A)(1). Motion. Within 7 days after the moving party discovered or by the exercise of diligence could have discovered the grounds therefor, and in any event before the jury is sworn to try the case, a party may move to stay the proceedings or for other appropriate relief, on the ground of substantial failure to comply with the applicable provisions of ORS chapter 10 in selecting the jury. (A)(2). Stay of proceedings. Upon motion filed under subsection (1) of this section containing a sworn statement of facts which, if true, would constitute a substantial failure to comply with the applicable provisions of ORS chapter 10 in selecting the jury, the moving party is entitled to present in support of the motion: the testimony of the clerk of court administrator, any relevant records and papers not public or otherwise available used by the clerk or court administrator, and any other relevant evidence...(A)(3). Exclusive means of challenge. The procedures prescribed by this section are

the exclusive means by which a party in a civil case may challenge a jury on the ground that the jury was not selected in conformity with the applicable provisions of ORS chapter 10.